(29,079)

(29,080)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 529.

DE WITT GARRISON BROWN AND ROOSA C. BROWN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

No. 530.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

DE WITT GARRISON BROWN AND ROOSA C. BROWN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 9, 1922.

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In the District Court of the United States in and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DeWITT GARRISON BROWN (sometimes known as DeWitt G. Brown) and ROOSA C. BROWN, his wife; STATE OF IDAHO; POWER COUNTY, State of Idaho,

Defendants.

No. 306.

COMPLAINT.

Now comes the Secretary of the Interior, acting in this behalf by the United States Attorney for the District of Idaho, thereunto duly authorized by the Attorney General of the United States, and complains of the Defendants and for cause of action alleges:

I.

That the Secretary of the Interior has selected the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$), Section 28, Township 7 South, Range 31 East of the Boise Meridian, Idaho, in said State and District of Idaho, and in the County of Power, for use in the construction of the American Falls Reservoir, a part of the Minidoka Project of the United States Reclamation Service, such project being under construction in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388) and Acts supplementary thereto and amendatory thereof. That the said project contemplates the use of the waters of Snake River for irrigation and reclamation of certain extensions of the said

Minidoka Project. That the natural flow of the Snake River during the latter part of the irrigation season has been appropriated by projects having rights prior in time to the rights of the proposed extension of the Minidoka Project, and that it is necessary in order to properly reclaim and irrigate the public lands of the United States in the said Minidoka Project to conserve and store in a reservoir, or reservoirs, the flood water and winter flow of the Snake River. That the Secretary of the Interior has caused surveys and investigations to be made for the location of a suitable reservoir for such purpose and has approved the said American Falls Reservoir as the most suitable reservoir for the impounding of said waters of Snake River. That the United States intends in good faith to construct the said reservoir, and that said project and said reservoir are being undertaken primarily for the irrigation and reclamation of public lands of the United States.

II.

That the said American Falls Reservoir when constructed and filled with water will inundate the greater portion of the City of American Falls in said County of Power and State and District of Idaho, thus making it necessary to utilize higher ground for the portion of the city so to be flooded, and to which higher ground it is necessary to move the buildings from the flooded area in order that such buildings may be saved. That the said land belonging to the defendants is a convenient and necessary site to which the buildings from the flooded area may be moved. That during the time when the dam at American Falls is being constructed, it will be necessary to provide a place of residence for the men to be employed in the construction of the dam, and space for teams, equipment, machinery, and supplies, and that said land of the defendants is convenient and necessary for such purpose. That the Act of Congress approved March 4, 1921 (Public No. 389) authorizes the Secretary of the Interior to purchase or condemn suit-

able land for a new townsite to replace the portion of the town of American Falls which will be flooded by the reservoir. That said W½NW¼ and NW¼SW¼, Section 28, Township 7 South, Range 31 E. B. M., claimed by the defendants is suitable and has been selected by the Secretary of the Interior to replace a portion of the town of American Falls which will be flooded by the reservoir, and to provide a means of saving the buildings on the portion of the town to be flooded as well as to furnish a place of residence for the men to be employed in the construction of the dam and space for teams, equipment, machinery and supplies needed in connection with such construction.

III.

That said land is necessary for said townsite and other purposes, said purposes being public and incidental to the reclamation under the national reclamation laws of the arid public land of the Minidoka Project and of other arid land in the Snake River Valley.

IV.

That defendants, DeWitt Garrison Brown (sometimes known as DeWitt G. Brown) and Roosa C. Brown, his wife, claim said W½NW¼ and NW¼SW¼ under patent from the United States dated June 5, 1911, and recorded in Book 27, Page 457 of the Records of Power County, Idaho.

V.

That defendant, the State of Idaho, claims a lien on said land under mortgage dated December 15, 1916, and recorded in Book 51, page 425 of the Records of Power County, Idaho.

IV.

That defendant, Power Company, a municipal corporation of the State of Idaho, claims a lien on said land for the 1920 and 1921 taxes.

VII.

That a disagreement has occurred and now exists between the defendants and plaintiff concerning the purchase of said tracts of land by the plaintiff in this- to-wit:

That the plaintiff and defendants are unable to agree upon a price for said land which this plaintiff considers to be reasonable; that the plaintiff has heretofore offered to purchase said premises from said defendants and that said plaintiff under and by virtue of the proceedings hereby instituted and to be continued in its behalf, proposes and offers to purchase said tract heretofore described.

VIII.

That the reasonable value of said property is Three Thousand and no/100 ($3,000.00) Dollars.

WHEREFORE, plaintiff prays that it be adjudged that the public use requires the condemnation of the real property hereinabove described, and that title in fee simple unincumbered be decreed to the plaintiff upon the plaintiff paying to the defendants the reasonable value of the property as ascertained by the Court.

J. R. SMEAD,
Assistant United States Attorney for the District of Idaho, and Attorney for Plaintiff.

B. E. STOUTEMYER,
District Counsel of the U. S. Reclamation Service.
Residence, Boise, Idaho.

STATE OF IDAHO,)
) ss.
COUNTY OF POWER)

R. M. Patrick, being first duly sworn, on oath says that he is District Counsel of the United States Recla

mation Service for the Minidoka Project, and as such is agent of the United States and is familiar with the above described American Falls Reservoir, and makes this affidavit on behalf of the Plaintiff, United States of America, and is authorized so to do.

That he has read and knows the contents of the foregoing complaint and believes the facts stated therein to be true.

R. M. PATRICK.

Subscribed and sworn to before me this 14th day of June, A. D. 1921.

SPENCER L. BAIRD,
Notary Public.

(N. P. Seal)

Residing at American Falls, Idaho.

My Commission expires Nov. 1, 1924.

Endorsed, Filed June 17, 1921,
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ANSWER.

Come now the defendants, DeWitt Garrison Brown, sometimes known as DeWitt G. Brown, and Roosa C. Brown, his wife, and for answer to the plaintiff's complaint on file herein, or to so much thereof as they are advised it is material for them to make answer unto, and without waiving any of the imperfections and uncertainties of the complaint, admit, deny and allege as follows:

1. Answering the allegations of paragraph I of said complaint these answering defendants have no knowledge, information or belief sufficient to enable them to

answer whether or not the Secretary of the Interior has selected the West Half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of Section Twenty-eight (28), Township Seven (7) South, Range Thirty-one (31) East of the Boise Meridian in Power County, Idaho, for use in the construction of the American Falls Reservoir, and basing their denial upon that ground, deny the same, and demand strict proof thereof.

Further answering the said paragraph I of the said complaint, these answering defendants deny that the property above described is in any sense or any manner useful to or necessary for the said American Falls Reservoir, or for any work in connection therewith.

2. Answering the allegations of paragraph 2 of said complaint, these answering defendants deny that the plaintiff has any authority whatever to condemn the land of these defendants for the purposes set forth in paragraph 2 of said complaint either as a site for buildings moved from the present village of American Falls or as a place of residence for the men employed in the construction of the reservoir or dam, or as a space for teams, equipment, machinery, supplies, or any of them; and deny that under the constitution and laws of the State of Idaho, or under any Act of Congress, the plaintiff in this cause has any authority to condemn suitable land for townsite purposes and deny that the matters and things alleged in paragraph 2 of said complaint are sufficient to justify the plaintiff in maintaining this action.

3. Answering paragraph 3 of said complaint, deny that the said land is necessary for townsite or other purposes, deny that any purposes for which the land is desired are public or incidental to the reclamation of any arid public lands whatever.

4. Admit the allegations of paragraph 4, 5 and 6.

7. Answering the allegations of paragraph 7, these defendants admit that a disagreement now exists between the plaintiff and defendants concerning the purchase the above described lands, but deny that the plaintiff has ever offered to these defendants any amount which the defendants consider reasonable, but on the contrary allege the fact to be that the only offer made by the plaintiff to these defendants was the sum of One Hundred ($100.00) Dollars per acre for land adjacent to land for which the plaintiff has paid One Hundred Sixty ($160.00) Dollars, approximately, per acre, which said land was of no greater value than these defendants' land, and upon which there were no greater improvements than upon the land of these defendants.

8. Answering the allegations of paragraph 8 of said complaint, these answering defendants deny that the reasonable value of the said property is Three Thousand ($3000.00) Dollars, but on the contrary allege the fact to be that the reasonable value of said property is Twenty-four Thousand ($24,000.00) Dollars.

These defendants for a further and separate defense to the plaintiff's complaint, allege as follows:

1. That the purpose for which the plaintiff desires the lands in said complaint described are to provide a neutral zone around the townsite of American Falls which the said plaintiff is now laying out, which shall not be privately owned, but which shall be owned by the public, and will prevent these defendants from realizing the value of the land which they could obtain by platting the same as an addition to the new townsite of American Falls, Idano; and that the plaintiff has no other purpose than the foregoing in seeking to condemn the lands of these defendants described in the complaint.

WHEREFORE, The defendants pray, First: That the plaintiff take nothing by its complaint, and that these defendants be dismissed hence without day, and

with their costs in this behalf most wrongfully sustained.

Second: That in case the Court should determine that the plaintiff is entitled to condemn the land of these defendants, that these defendants to have judgment against the plaintiff for the true value thereof, namely: Twenty-four Thousand ($24,000.00) Dollars, and for costs of suit.

And the defendants will ever pray.

PETERSON & COFFIN,
Attorneys for Defendants, DeWitt Garrison Brown and Roosa C. Brown.
Residence, Pocatello, Idaho.

STATE OF IDAHO,)
) ss.
County of Bannock,)

T. C. COFFIN, being first duly sworn, upon his oath, deposes and says: That he is one of the attorneys for the defendants in the above entitled action; that he has read the above and foregoing ANSWER, and knows the contents thereof, and that he believes the facts therein stated to be true; that he makes this affidavit for the reason that the defendants, DeWitt Garrison Brown and Roosa C. Brown, are both absent from Bannock County, Idaho, where this affiant resides.

T. C. COFFIN,

SUBSCRIBED and sworn to before me this 23rd day of July, 1921.

E. H. THORNTON,
Notary Public.
(N. P. SEAL) Residing in Pocatello, Idaho.

Endorsed, Filed July 25, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

MENDMENT TO ANSWER OF DeWITT GARRI SON BROWN AND ROOSA C. BROWN, HIS WIFE.

COME NOW the defendants, DeWitt Garrison Brown nd Roosa C. Brown, his wife, and move to amend their nswer on file herein, and particularly paragraph II ereof, as follows:

II.

Answering the allegations of Paragraph II of the said Complaint said defendants admit that the said Ameri- an Falls Reservoir, when constructed and filled with vater will inundate the greater portion of the City of American Falls in said County of Power and State and District of Idaho, but deny that such inundation thus or otherwise makes it necessary to utilize higher ground for the portion of the city so to be flooded, and deny that it is or will be necessary to move to such or any higher ground, the buildings from the flooded area in order that such buildings may be saved, or for any other reason; deny that the said land belonging to the de- fendants is a convenient or necessary site to which the buildings from the flooded area may be moved; deny that during the time when the dam at American Falls is being constructed it will be necessary to provide a place of residence for the men to be engaged in the con- struction of the dam or space for teams, equipment, machinery or supplies, and deny that the said land of the defendants is convenient or necessary for such pur- pose; deny that the Act of Congress approved March 4, 1921 (Public No. 389) authorizes the Secretary of the Interior to purchase or condemn suitable lands for a new townsite to replace the portion of the town of American Falls which will be so floded by the reservoir; and deny that said Secretary of the Interior has been otherwise or at all so authorized or empowered; deny

that said West One-half, Northwest Quarter, and Northwest Quarter Southwest Quarter of Section 28, Township 7 South, Range 31 E., B. M., or any other lands claimed by the defendants is suitable or has been selected by the Secretary of the Interior to replace a portion or any of the Town of American Falls which will be flooded by the reservoir or to provide a means of saving the buildings on the portion of the town to be flooded, as well as to furnish a place of residence for the men to be employed in the construction of the dam and space for teams, equipment, machinery and supplies needed in connection with such construction; and deny that said land or any land of the defendants is necessary or suitable for townsite purposes or for the use of employees as alleged in the said paragraph of plaintiff's complaint herein.

These defendants further deny that the plaintiff has any authority whatever to condemn the land of these defendants for the purposes set forth in Paragraph II of the said Complaint, either as a site for buildings moved from the present Village of American Falls or as a place of residence for the men employed in the construction of the reservoir or dam, or as a space for teams, equipment, machinery, supplies, or any of them; and deny that under the constitution and laws of the State of Idaho, or otherwise, or at all, or under any Act of Congress, the plaintiff in this cause has any authority to condemn suitable lands for townsite purposes or for the purpose of providing homes for employees or for storing machinery or any other purpose in connection with the construction of said dam; and deny that the matters and things alleged in Paragraph II of the said Complaint are sufficient to justify plaintiff in maintaining this action.

COFFIN & PETERSON,
Attorneys for Defendants, DeWitt Garrison Brown and Roosa C. Brown, his wife.

Endorsed, Filed Nov. 4, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

VERDICT.

We, the jury in the above entitled cause, find the land described in the complaint to be of the value of $6250.00, such valuation being as of the time of issuance of the summons herein, in June of 1921.

The amount so assessed does not include interest.

ROBT. J. ARMSTRONG, foreman.
RAYMOND CRABTREE
BERT M. GRAY
EDWIN L. JENNINGS
P. C. JENSEN
GEO. W. EGBERT
JAMES JENKINS
W. C. BARNES
SCOTT V. DARLING
A. M. HOBBS
JOHN LAPRAY
B. P. COPE

Endorsed, Filed March 15, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

JUDGMENT.

1. The above cause coming on duly to be heard on the 15th day of March, 1922, the Plaintiff appearing by its attorneys the U. S. District Attorney, E. G. Davis, and B. E. Stoutemyer, and the defendants, De-

Witt Garrison Brown and Roosa C. Brown, appearing by their attorneys, Peterson & Coffin, and all defendants having filed their Answers herein, the State of Idaho having appeared and answered by its Attorney, Roy L. Black, Attorney-General of the State of Idaho, and Power County having appeared and answered by its attorney, Charles T. Cotant, County Attorney, and the parties hereto having heretofore stipulated and agreed that all issues involved in the above entitled cause of action except the issue of the value of the property should be tried before the Court and decided by the Court, but that the issue as to the value of the property should be reserved to be tried before the jury, and the Court having heretofore made an order for the taking of the testimony in the above entitled cause of action on all issues other than the issue of the value of the property before Charles W. McClain, Special Examiner of the Court, and the plaintiff and the said defendants having appeared before the said Special Examiner and submitted their testimony before the Special Examiner on all issues other than the value of the property sought to be condemned, and the said Special Examiner having transcribed the said testimony and reported the same to the Court, and the parties having appeared before the Court by their respective attorneys, and having argued the question of the right of the plaintiff to condemn, and all issues other than the issue of the value of the property described in the Complaint, and having filed briefs herein on said issues, and the Court having duly considered the evidence and the law and facts pertaining to the said issues other than the value of the property, and the Court heretofore on the 10th day of February, 1922, having filed its decision herein on all issues other than the value of the property described in the Complaint, and having decided that the plaintiff has the right to condemn the premises described in the Complaint upon the payment of the value thereof to be determined by the jury, the said cause of

action was duly tried before the jury on the said 15th day of March, 1922;

2. AND WHEREAS, the Defendants, DeWitt Garrison Brown and Roosa C. Brown, in their Answer have admitted the allegations of paragraphs 4, 5 and 6 of the Complaint,

3. AND WHEREAS, the Defendant, the State of Idaho, has appeared in the said above entitled cause of action and set out in its Answer the interest of said State of Idaho in the said premises, namely, that the State of Idaho holds a mortgage on said premises to secure a certain promissory note in the principal sum of One Thousand Five Hundred ($1,500.00) Dollars, with interest thereon at the rate of six (6%) per cent per annum prior to maturity, and ten (10%) per cent per annum after maturity.

4. AND WHEREAS, it was agreed by the said Defendants, DeWitt Garrison Brown and Roosa C. Brown, in open Court during the progress of said trial, that the Defendant, State of Idaho, has the interest in said premises set out in the Answer of the said Defendant, State of Idaho, and that the Defendant, the County of Power, has a lien on said premises for taxes, and that at the time of the trial of said cause the last half of the taxes for the year 1921 had not been paid, and the Plaintiff having offered oral and documentary evidence, and the Defendants, DeWitt Garrison Brown and Roosa C. Brown, having offered oral testimony, and said issues of fact having been submitted to the jury, the jury thereafter returned its verdict fixing the value of said premises sought to be condemned at the sum of *Six Thousand Two Hundred Fifty Dollars at date of Summons. The interest to which defendants are entitled is hereby found to be the sum of $328.12, Three Hundred Twenty-eight and 12/100 Dollars.*

5. NOW, THEREFORE, it is ordered, adjudged

and decreed by the Court that the land described in th Complaint and sought to be condemned is necessary fo the public purpose set out in the Complaint and tha upon the payment by the plaintiff to the defendan State of Idaho, or to the Clerk of the Court, of the su of ONE THOUSAND FIVE HUNDRED SIXTY THREE and THIRTY-THREE/HUNDREDTH ($1,563.33) DOLLARS, and the payment by th plaintiff to the defendant, Power County, or to th Clerk of the Court for said defendant, Power Count of the sum of FORTY-ONE AND FIFTY-TWO HUN DREDTHS ($41.52) DOLLARS, and the payment t the defendants, DeWitt Garrison Brown and Roosa C Brown, or their attorneys, or to the Clerk of the Cour of the difference between the said value as found b the jury with interest as herein set out and th amounts hereinabove provided to be paid to the defen ant, State of Idaho, and defendant, Power County, t wit, the sum of $4973.27.

Final Order of Condemnation in favor of the plai tiff and against the said defendants will be entere herein as provided by law and prayed for in the Com plaint, decreeing and conveying to the plaintiff, Unite States of America, title in fee simple to the followin described property, to-wit:

"West half of the Northwest quarter (W½NW¼) and th Northwest quarter of the Southwest quarter (NW¼SW¼ Section Twenty-eight (28), Township seven (7) South, Ran Thirty-one (31) East, Boise Meridian, Idaho."

6. IT IS FURTHER ADJUDGED AND DE CREED that should the defendants, DeWitt Garriso Brown and Roosa C. Brown pay to Power County a taxes now outstanding as a lien against said premis and secure the discharge of said lien prior to payme by the United States, then the amount herein provide to be paid to Power County may be paid instead to th

Plaintiff's Exhibit B.

DEPARTMENT OF THE INTERIOR
UNITED STATES RECLAMATION SERVICE.
Washington, D. C.

Office of the Director.

CERTIFICATE.

PURSUANT to the provisions of the Act of Congress approved August 24, 1912, (37 Stat., 497), I HEREBY CERTIFY that the annexed copy of letter dated April 21, 1921, from E. C. Finney, First Assistant Secretary, to the Attorney General constitutes a full, true and literal exemplification of letter contained in the official files in the custody of this office.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States Reclamation Service to be affixed, this 12th day of Sept., A. D., 1921.

(Signed) MORRIS BIEN,
Acting Director, U. S. R. S.

(SEAL)

OH GAW

DEPARTMENT OF THE INTERIOR
Washington

APR. 21, 1921.

Dear Mr. Attorney General:

Under the authority of the National Irrigation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, the United States Reclamation Service is now engaged in work preliminary to the construction of a large dam across the Snake River at American Falls, Idaho, which dam is intended to be used in connection with an extension of the Minidoka Federal Irrigation project.

The proposed reservoir would flood a major portion of the land now included within the corporate limits of the City of American Falls, a town of about 1,500 people. Our plan is to develop a new town just outside the limits of the present town and above the high-water line of the proposed reservoir, purchasing or condemning the lands within the submerged area and, where practicable, making an exchange of lots and removing houses and other improvements from the old townsite to the new townsite. An adjustment of this kind would permit the Government to secure the required area for the reservoir at much less expense than would otherwise be the case, and consequently would make the construction of the reservoir more feasible thru a reduction of cost.

The Sundry Civil Appropriation Act of March 4, 1921, (Public 389, 41 Stat.,.....), contains the following provision:

> Minidoka project, Idaho: For operation and maintenance, continuation of construction, and incidental operations, with authority in connection with the construction of American Falls Reservoir, to purchase or condemn and to improve suitable land for a new townsite to replace the portion of the town of American Falls which will be flooded by the reservoir, and to provide for the removal of buildings to such new site and to plat and to provide for appraisal of lots in such new town site and to exchange and convey such lots in full or part payment for property to be flooded by the reservoir and to sell for not less than the appraised valuation any lots not used for such exchange, $1,735,000, together with the unexpended balance of the appropriation for this project for the fiscal year 1921.

The United States has already acquired by purchase 495 acres of land for the proposed townsite and desires to secure title to an additional and adjoining 120 acres owned by DeWitt G. Brown, in order to make the townsite of sufficient size to meet the needs above described. The said 120 acres owned by said Brown are described as follows:

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The United States has already acquired by purchase 495 acres of land for the proposed townsite and desires to secure title to an additional and adjoining 120 acres owned by DeWitt G. Brown, in order to make the townsite of sufficient size to meet the needs above described. The said 120 acres owned by said Brown are described as follows:

> West half of Northwest quarter (W½NW¼) and the Northwest quarter of Southwest quarter (NW¼SW¼), Section twenty-eight (28), Township seven (7) South, Range thirty-one (31) East, B. M., Power County, Idaho.

The United States has attempted to acquire title to the lands in question but has been unable to agree with the owner upon a purchase price. The estimated value of said land is less than $12,000, and the Reclamation Service has available a sufficient amount of unencumbered funds to meet any court award that might be made in proceedings brought to secure the condemnation of said property.

I find that the United States requires the 120 acres of land above described for a townsite as an incident to making more feasible the construction of the proposed American Falls dam for Federal irrigation purposes, and accordingly it is requested, under the authority of Section 7 of said act of June 17, 1902, that you instruct the United States Attorney for the District of Idaho to cause proceedings to be commenced for condemnation of the lands in question, and that in such proceedings fee simple title be secured to the United States.

Mr. B. E. Stoutemyer, District Counsel, U. S. Reclamation Service, Boise, Idaho, will furnish the United States Attorney all needful information in detail and will cooperate with him to such further extent as may be desired.

Sincerely,

E. C. FINNEY,
First Assistant Secretary.

The Honorable,
The Attorney General.

said defendants, DeWitt Garrison Brown and Roosa C. Brown.

FRANK S. DIETRICH,
Judge.

Done this 25th day of March, 1922.

Endorsed, Filed March 25, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

BILL OF EXCEPTIONS.

1. Be it remembered that the above entitled cause having been placed regularly on the calendar of the above entitled Court for trial at a stated term of the above entitled Court begun and holding in Pocatello, Idaho, in October, 1921, and the parties to the said action by their respective attorneys having on the 12th day of October, 1921, entered into the following stipulation:

"It is hereby stipulated by and between plaintiff and the defendants, DeWitt Garrison Brown and Roosa C. Brown, that the testimony in the above entitled cause as to all issues other than as to the value of property, may be taken before Charles W. McLain as refere, who shall transcribe the testimony and submit the same to the Court for decision by the Court without a jury of the issue of the right to condemn, and all other issues except the issue as to the value of the property sought to be condemned. It is understood that the issue in regard to the value of the property is reserved for submission to the jury and all evidence concerning the issue of the value of the property shall be submitted to the jury after the decision by the Court of the issue as to the right to condemn. That each party will pay one-half of the cost of taking and transcribing of the testimony taken by the referee. That unless otherwise agreed by counsel the testimony will be submitted before he referee beginning at 10 o'clock A. M., on Monday, the 17th day of October, 1921, or as soon thereafter

as the referee can hear the same, at the town of Pocatello, at the office of the Federal Building.

Dated at Pocatello, Idaho, this 12th day of October, 1921.

J. L. McCLEAR,
United States Attorney for the District of Idaho.
B. E. STOUTEMYER,
Attorney for the United States Reclamation Service,
Residence, Boise, Idaho,
Attorneys for Plaintiff;
PETERSON & COFFIN,
Residence, Pocatello, Idaho,
Attorneys for Defendants, DeWitt Garrison Brown and Roosa C. Brown."

2. Be it further remembered, That in accordance with the stipulation aforesaid, an order similar in its terms to the agreement contained in the said stipulation was made and entered in the cause, and the testimony of witnesses was thereafter, on October 17, 1921, taken before Charles W. McClain as special examiner, the plaintiff being represented by J. L. McClear, United States Attorney for the District of Idaho, and B. E. Stoutemyer, Attorney for the United States Reclamation Service, and the Defendants, DeWitt Garrison Brown and Roosa C. Brown, by J. H. Peterson and T. C. Coffin, Esquires, and the following proceedings were had, to-wit:

3. F. A. Banks, a witness produced on behalf of the plaintiff, after being duly sworn, testified that he was a civil engineer and held a B. S. degree from the University of Maine, and thereupon it was admitted by the defendants that he was a properly qualified irrigation engineer. He thereupon further testified that he was a division designing engineer in Boise, Idaho, during the construction of the Arrowrock Dam, and that he had prepared all the preliminary plans of that dam, and had designed and built the Jackson Lake dam in Wyoming that he was the construction engineer for the proposed

dam and reservoir at American Falls, and as such was familiar with the plans, dimensions and location of the proposed dam.

4. Counsel for defendants admitted the witness's qualifications as a civil engineer, irrigation engineer, and hydraulic engineer.

5. The witness further testified that from his experience as an engineer in construction of irrigation dams, he was able to state, approximately, the number of men who would be employed on the American Falls dam, and that, in his opinion, about one thousand would be necessary.

6. The witness further testified that, in his opinion, and based upon his experience as an engineer, particularly in connection with the construction of large irrigation dams, it tended to efficiency and economy in the construction of such work to provide a place of residence for the men and employees on account of the fact that a number of the men employed on the job would bring their families with them, and that it was necessary to provide some place in which the families could live and a plot of ground on which they could have a garden and such other conveniences as were necessary, thereby tending to hold men on the job who might otherwise be floaters.

7. Witness further testified that about 640 acres of the present town of American Falls would be flooded, or approximately three-fourths of the townsite; that the population of American Falls according to the last census was approximately 1500.

8. Thereupon the plaintiff offered and had marked for identification Plaintiff's Exhibit A, being a map showing the present townsite of American Falls, and the proposed new townsite, said Exhibit A being included as a part of this Bill of Exceptions, and the

witness by reference to the map testified that the flooded area would lie north of the green line on the map and east of the river. The witness testified that he did not consider it practical to move the houses and buildings from the area which would be flooded across Snake River, and that the high land adjacent to the present townsite of American Falls to which it would be practical to move the buildings then located upon land which by the reservoir would be flooded, was the land of the defendant and other lands which had been platted and were indicated in red on Exhibit A and which included the lands of the defendant; that the lands of the defendant, as a part of the new townsite, were suitable for the removal of buildings which are now located in the area about to be flooded; that it was impracticable to move the buildings across the river because of the location of the river and the necessity of moving the buildings up a bluff about one hundred feet high, and that there was no land suitable or convenient for the removal of these buildings and establishment of a new townsite other than the lands of the defendant; the witness further testified that it would probably take four years to construct the first unit of the dam; that there would then probably be an interval of ten or fifteen years before the irrigation development of the country would justify the construction of the dam to its full height; and it would then probably take four years more to complete the dam to its full height;

9. That it would be necessary to move about two or three miles of track of the Oregon Short Line Railroad Company when the dam was completed; that the area of the proposed new townsite was less than the area of the present townsite which would be flooded; that the population of American Falls would probably be doubled during the period of construction; the witness further testified that the land of the Defendant Brown was indicated on Exhibit A in orange color, and that it was the intention of the Government to use the land belong-

ing to the Defendant Brown for townsite purposes and for the purpose of places of residence for employees of the Government in connection with the construction of the dam, and that the proposed new townsite had been definitely planned by the Government officers and on Exhibit A appeared as the area inside the red line.

10. Plaintiff thereupon identified and offered in evidence as Plaintiff's Exhibit B a letter from the Secretary of the Interior to the Attorney General, the subject of which was the selection of the lands in question for the purposes in question, said Exhibit B being included as a part of this Bill of Exceptions.

11. The witness further testified that about 475 acres of land were included within the new townsite of which 120 acres was the land sought to be condemned in this suit, and that all of the land had been purchased or made available for townsite purposes except about 165 acres, including the lands of the Defendant Brown.

12. On cross-examination by Mr. J. H. Peterson, the witness testified that on the map, Exhibit A, the line of railroad as proposed to be changed was shown by a blue line; that the location of the new station at American Falls was shown on the map about a quarter of a mile south of the north line of Section 29 and a quarter of a mile northeast of the center of Section 29, which location had been selected by the railroad officials and had been adopted by the Government as the location of the new station, which said station was a little less than half a mile from the closest point on the land of the Defendant Brown; that it was a little over half a mile from the Brown land to the nearest or closest end of the proposed dam, and about a mile and a half from the other end and that in order to reach the Brown lands from the dam itself or from the proposed railway station it would be necessary to traverse about a half mile

through the proposed new townsite; that the figures on the map intended to show the topography thereof were elevations which had been taken from bench marks established in that locality by the United States Coast and Geodetic Survey, representing the elevation above the mean sea level, and that the condition of the country between the Brown lands and the dam and railroad station is comparatively level.

13. The witness further testified on cross-examination by J. H. Peterson, that it was the intention of the Government to use the Brown lands for townsite purposes and for housing its employees, and that it would be possible to use all of the defendant's land for housing employees of the Government engaged in the construction of the dam, but the witness was unable to state the exact proportion that the Government would use for townsite purposes and the proportion intended for use for housing employees, but testified that it will be used for both purposes.

14. The witness further testified on cross-examination that it would be necessary to house the employees upon land that would be satisfactory for their homes and their gardens in order to make them satisfied with their locations and to give them conveniences such as sewer and water and other works of that character, and that the portion of the new townsite closest to the proposed work would probably be dedicated to the business district for which reason it would not be practical to locate the houses in that district, and that the government had a well defined and distinct plan in mind as to the location of the business district as well as the location of the residence district.

15. The witness then identified as Defendants' Exhibit No. 1 a photostatic copy of the general plan of the new Village of American Falls as proposed by the Department of the Interior and adopted by the Goverr-

ment, which Exhibit No. 1 is included as a part of this Bill of Exceptions, and testified on cross-examination by J. H. Peterson that said photostatic copy included a portion of the old townsite which was divided from the new townsite by a dash and dot line, the portion of the old town being that lying between the dot and dash line and Snake River; that the lines on the plat represented streets and alleys, and that the proposed business district was the land between what is designated on the said exhibit as the public square and the site of the station, the broad street running from the square to the station being the axis of the business district; the triangular tract of land on the Brown tract was the suggested location for school purposes, and the portion which appeared to be a broad avenue was in a part of the residential district, and the witness further testified on cross-examination by J. H. Peterson that it was the purpose of the Government to utilize the Brown lands concurrently for townsite purposes and housing their employees, and that they would move the houses from the present part of the town to the Brown tract and rent the houses to their employees, and then after the occasion which required their use for employees had passed to dispose of them for townsite residential purposes by sale; that practically all of the Brown area is included in that portion of the town that is to be used for residences for which reason it was proposed to locate the buildings that would be used by the Government employees on that land although there were a few residential districts and lots closer to the railroad than the Brown lands; that about three tiers of blocks north of the area designated as park and all of the area south of the tract designated as park would be residential lots as well as a few blocks adjacent to the Brown property in the north end of the town, and that all the rest of the plat would be business and industrial.

16. The witness further testified that that portion of the townsite shown in Defendants' Exhibit No. 1 as being located southwesterly from the dotted line is

the part of the townsite now located on the south side
the railroad track at the Village of American Falls, a
this portion upon which probably one-fourth of the pe
ple of American Falls live would not be affected by t
dam; that about 1125 people now living in the porti
of American Falls which would be flooded plus whatev
people might be attracted to American Falls by t
construction work going on are the people for whom t
Government proposes to condemn the American Fal
townsite so as to be able to accommodate these peop
when the old townsite is flooded; that the new peop
who would be attracted to American Falls during co
struction would be mainly the Government employe
and their families.

17. The witness stated that the plan for the tow
site had not been so definitely decided yet as to enab
him to state how many lots would be offered for sal
whether they would be offered for sale on the open ma
ket, whether they would be exchanged by owners
property in the present townsite, or whether the hous
now occupied by Government employees in the prese
townsite would be moved to the Brown property as
place of residence for the present employees and futu
employees of the Government connected with the wor
and that to date there had been no official reservation
any particular land made for the purposes of the Go
ernment employees and that at the present time t
Brown lands are in the same position as the balance
the lands included in the new townsite as regards su
matters.

18. The witness further testified that the arrow
Defendants' Exhibit No. 1 pointed north.

19. The witness further referred to Defendan
Exhibit No. 1, and testified that the irregular piece
land shown on the Brown land was a suggested reserv
tion for a court house; the witness testified that t
plat of the proposed Government townsite, copy of whi

is in evidence as Defendants' Exhibit No. 1, was prepared by a city planner employed by the Government to plan the town and that the said plat has been accepted by the Government.

20. Thereupon DeWitt Garrison Brown, one of the defendants, being called as a witness in his own behalf, testified on direct examination by Mr. Peterson that he was the owner of the tract of land sought to be condemned in this action, and that he was acquainted with American Falls and the land adjacent to and adjoining it, and in the vicinity thereof; the witness testified that there was a great deal of available unoccupied lands adjacent to the proposed dam at American Falls, and testifying with reference to the plat, Plaintiff's Exhibit A, described the land as being west of the river and in the vicinity of the westerly end of the proposed dam, and some east and north of the dam.

21. On cross-examination the witness testified that the vacant lands be referred to as being suitable as a place of residence for employees of the Government is not public land but all land in private ownership and that a great deal of it is land that will be flooded by the reservoir.

22. Mr. Banks, being recalled, testified that the lands referred to in the testimony of the Defendant Brown as suitable for residences of employees of the Government, would not be suitable as a place of residence for Government employees or a place to remove the houses from the present townsite, because of the fact that some of them will be flooded and others on account of rough topography and the difficulty of securing a suitable water system and sewer system in that location, and that the bluff on the west side of the river is one hundred feet high.

23. Thereafter, upon the stipulation and order mentioned heretofore, the cause was submitted to the Hon-

orable F. S. Dietrich, District Judge, who on Februa
10th, 1922 rendered and filed in the cause the decisio

"Dietrich, District Judge:

"This is a suit in eminent domain, by which the Governme
seeks to acquire the title in fee simple to 120 acres of land, t
property of the defendant, DeWitt G. Brown, situate ne
American Falls, in Power County, Idaho. It is shown th
proceeding under the Reclamation Act (32 Stat. 388) and a
supplementary thereto, the Secretary of the Interior intends
construct a dam across the Snake River at American Falls,
means of which flood waters are to be impounded for use,
part at least, in irrigating lands embraced in the Minido
project, a short distance down the river. From the weste
or right bank of the river at this point the ground rises abru
ly, but along the lower, easterly bank is a strip of compar
tively level land, which comprises the site of the town, and t
plan is to build a dam that will not only obstruct the riv
channel, but will extend across this level tract to higher grou
east of the town, and thus sub-merge the up-river portion
the townsite. The lands in question are a little more than h
a mile east of the easterly end of the proposed embankme
and are apparently thought to be suitable for use as a part
the new townsite. It is estimated that at the present ti
American Falls has about 1500 inhabitants, and that the tow
site embraces in excess of 800 acres, approximately thre
fourths of which will be flooded. The Government has
ready acquired 495 acres for the new site, and desires the a
ditional tract in controversy.

"It is also alleged that in part the land is desired for the te
porary housing of workmen to be employed in constructing t
dam. But there is no attempt either in the pleading or in t
evidence to segregate or describe the area desired for that pu
pose. Moreover, there seems to be no competent authori
for such an averment. The testimony as to the plans a
purposes of the Government is only that of a local engineer
the Reclamation Service, who manifestly is without authori
to speak upon the subject. I am not unmindful of the ru
recognized in Forbes v. United States, 268 Fed. 273, and t
cases therein cited, but of course, the presumption there i
dulged is not conclusive. As a part of the evidence here su
mitted we mind a certified copy of a letter written April 2
1921, by the First Assistant Secretary of the Interior to t
Attorney General, stating that the land is desired for the ne
townsite and requesting the latter to direct the District Atto
ney for Idaho to bring the suit; no other intended use is i
timated. This letter was introduced by plaintiff, and presu

ably it is the warrant, and the only warrant, for the commencement of the action. Neither the District Attorney by averment nor the engineer of the local Reclamation Service by speculation as to the manner in which the construction work will probably be prosecuted, can add to or modify the purpose for which the land is sought, as such purpose is declared by the only officer having the requisite authority.

"Can the land be condemned for townsite purposes Under Section 7 of the Reclamation Act, condemnation proceedings are authorized in all cases where, in carrying out the provisions of the Act, it becomes necessary to acquire any rights of property; and by the laws of Idaho irrigation is recognized as a public use. Hence, the power of the Government to construct the proposed reservoir, and its right to do all things incidentally necessary to that end, the defendant does not question. Burley v. United States, 179 Fed. 1. McCullough v. Maryland, 4 Wheat. 408. Upon the other hand, it must be conceded that generally the Government is without the power to engage in the promotion of townsites, and unless the enterprise here bears a substantial relation to the irrigation project it cannot be held to be of such a public character as to warrant the exappropriation of private property. Such relation does not necessarily arise from the mere fact that the townsite may turn out to be profitable and that the irrigation project, being the beneficiary, may be constructed at a smaller net cost than would otherwise be possible. The townsite may or may not be profitable; the promotion of such enterprises is necessarily a speculative and hazardous business. But assuming that it will be profitable, an enterprise by which private property is taken for essentially private uses is not rendered public by the fact that the incident profit is to be applied to public purposes. Were the proposed use of an expected profit the criterion, the right of the Government to take private property would be practically unlimited. It might condemn not only the requisite site for a post office, but likewise an indefinite amount of other property, merely to be sold back into private ownership, at a profit out of which to pay for the site. However, the case here presents other considerations. The conditions are exceptional. The major part of an improved and occupied townsite is essential to the execution of a great public work. Vested rights there are in great variety and complexity, public as well as private. It is fair to assume that on the townsite are streets and avenues, sidewalks, water pipes, sewers, school houses, and possibly other public structures. The right to condemn may be doubtful, and even if the right be assumed, the process of procuring title, necessarily intricate and difficult. By providing and improving an equivalent site in close proximity,

the Government may, by voluntary action on the part of pri vate owners and the public, be able to acquire rights whic otherwise it would be impossible or at least extremely difficul to extinguish. Led by these and other considerations, Congres has deemed the matter of sufficient importance to supplemen the general power granted in Section 7 of the Reclamatio Act by an express provision specifically conferring authorit 'to purchase or condemn and to improve suitable land for new townsite, to replace the portion of the town of America Falls which will be flooded by the reservoir, and to provide fo the removal of buildings to such new townsite,' etc. Sundr Civil Appropriation Act of March 4, 1921, 41 Stat. 1403.

"It is well settled that while the question whether the pur pose of a taking is a public one, is judicial, *Hairston vs. Dan ville, etc. Ry Co., 208 United States 398;* the necessity and th proper extent of a taking is a legislative question, *Shoemake vs. United States, 147 United States, 282, 289; United States v Gettysburg Ry. Co., 160 United States, 668, 685; United State vs. Chandler-Dunbar W. P. Co., 229 U. S. 53, 65.* Sears v City of Akron, 246 U. S. 242. By the provision above quote from the Civil Appropriation Act, Congress has unmistakabl declared the use a public one, and in United States vs. Gettys burg Ry. Co., *supra*, the Supreme Court commenting upon suc legislative declaration, said:

" 'It is stated in the second volume of Judge Dillon's work o Municipal Corporations (4th Ed. Sec. 600) that when the leg islature has declared the use or purpose to be a public one, it judgment will be respected by the courts, unless the use b palpably without rasonable foundation. Many authorities ar cited in the note, and indeed the rule commends itself as rational and proper one.

" 'As just compensation, which is the full value of the prop erty taken, is to be paid, and the amount must be raised b taxation where the land is taken by the Government itsel there is not much ground to fear any abuse of the power. Th responsibility of Congress to the people will generally, if no always, result in a most conservative exercise of the right. I is quite a different view of the question which courts will tak when this power is delegated to a private corporation. In tha case the presumption that the intended use for which the cor poration proposes to take the lands is public, is not so stron as where the Government intends to use the land itself.

" 'In examining an act of congress it has been frequently sai that every intendment is in favor of its constitutionality. Suc act is presumed to be valid unless its invalidity is plain an apparent; no presumption of invalidity can be indulged; i must be shown clearly and unmistakably.'

"In view of the unusual conditions here confronting Congress, I do not think it can be said that its judgment, as expressed in the language quoted, is 'palpably without reasonabl foundation'; upon investigation it may have been fairly concluded that, without such authority, it would be impracticable for the Reclamation Service to execute the reservoir project. And, hence, under the principles enunciated by the Supreme Court, the validity of the act must be recognized and the right of the Government to condemn, sustained."

24. Thereafter and on the 15th day of March, 1922, pursuant to the stipulations filed herein, the issue as to value of the property sought to be condemned was submitted to the Court sitting with a jury and the Defendant DeWitt Garrison Brown testified among other things, that he received patent for the land in 1911, that most of it had been brought under cultivation from time to time, that some years crops had been grown thereon, either by himself or his lessee, and that his intention had always been ultimately to use the land for townsite purposes or as irrigated land close to the townsite. The land was not farmed in 1921. The only interference by the plaintiff with the defendant's possession or use of the land consists of the commencement of this suit and the issuance of summons therein, and the service thereof upon the defendant in June, 1921.

Thereupon the Court charged the jury at some length, but no exceptions were taken to any part thereof, and hence the instructions are not incorporated in this bill of exceptions. During the course of said charge, and after the Court had advised the jury that under the statutes of the state they must determine the value as of June, 1921, the time when the summons was issued and served, the Court, turning to counsel, suggested that unless one or the other preferred a submission in a different way, the qustion of the value of the land in June, 1921, would be submitted to the jury, reserving the question of interest for the Court. No objection was made by counsel for either side to the proposed course, and thereupon the court explained to the

jury that their verdict should be for the value of th land at the date of the issuance of summons in June 1921, and that their verdict would not include interest but that the interest would be computed later, and henc the jury need not concern themselves therewith, t which instruction no objction was made or exceptio taken. After deliberation under said instructions, th jury brought in a verdict finding the value of the lan in June, 1921, to be $6,250.00, and thereupon the Court computing interest on said amount at the rate of seve per cent from the date of the issuance of summons u to the date of the judgment, added to the amount of sai verdict the amount of such interest, namely, $328.12 making the total judgment $6,578.12, and thereupo judgment was entered for that amount.

Each side is allowed exception to the judgment.

The foregoing is hereby duly allowed and settled a a true bill of exceptions in the cause.

Dated this 27th day of June, 1922.

FRANK S. DIETRICH,
District Judge.

Endorsed.
Lodged June 19th, 1922,
Filed June 27th, 1922,
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 306.

PETITION FOR WRIT OF ERROR.

TO THE HONORABLE FRANK S. DIETRICH, Judg of the United States District Court, aforesaid:

Now come DeWitt Garrison Brown and Roosa C. Brown, by their attorneys, J. H. Peterson and T. C. Coffin, and respectfully show that on the 25th day of March, 1922, the Court entered a final judgment against your petitioners and in favor of the United States of America in the above entitled cause, by which said judgment the Court decreed the condemnation of certain lands owned by your petitioners.

Your petitioners feeling themselves aggrieved by said judgment, entered as aforesaid, herewith petition the Court for an order allowing them to prosecute a writ of error to the Supreme Court of the United States under the laws of the United States in such cases made and provided and particularly under the provisions of Section 238 of the Judicial Code for the reason that there is drawn into question in this cause the constitutionality of that certain Act of Congress authorizing the condemnation of lands situated near American Falls, Idaho, for townsite purposes, said Act of Congress as claimed by the plaintiff in the above entitled cause authorizing the condemnation of the lands for said purposes being Section 7, of the Reclamation Act of June 17, 1902 (32 Stat. at Large, 388) and the Sundry Civil Appropriation Bill, approved March 4, 1921 (41 Stat. at Large, 1403).

WHEREFORE, In consideration of the premises your petitioners pray that writ of error do issue to the United States Supreme Court at Washington, D. C., for the correction of errors complained of and herewith assigned, and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be

suspended until the determination of said writ of error by the United States Supreme Court.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Plaintiffs in Error.
Residence and P. O. Address,
Pocatello, Idaho.

SERVICE of the foregoing Petition for Writ of Error, by receipt of a copy thereof, admitted this 19th day of June, 1922.

E. G. DAVIS,
B. E. STOUTEMYER,
Attorneys for Defendant in Error.

Endorsed, Filed June 19, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

PETITION FOR WRIT OF ERROR ON CROSS APPEAL WITH ALLOWANCE ENDORSED.

The above named plaintiff in the above entitled cause conceiving itself aggrieved by the Judgment made and entered in the above-entitled cause, and particularly that part thereof requiring the plaintiff to pay to the defendants, interest in the sum of THREE HUNDRED TWENTY-EIGHT AND TWELVE/HUNDREDTHS ($328.12) DOLLARS, in addition to the value of the premises sought to be condemned as found by the jury, for the reasons set forth in the Assignment of Errors which is filed herewith, prays that its Petition for Writ of Error on its said Cross Appeal may be allowed, and that the transcript of the record, proceedings and papers prepared in connection with defendants' appeal herein,

be extended to include the records of Plaintiff's Cross-Appeal, and Plaintiff's Assignment of Error on Cross-Appeal, and that a transcript of the record, proceedings and papers upon which the order allowing Plaintiff's said Cross-Appeal was made, duly authenticated, may be sent to the United States Supreme Court.

Dated this 20th day of June, 1922.

E. G. DAVIS,
U. S. District Attorney,
B. E. STOUTEMYER,
District Counsel, U. S. Reclamation Service.
Attorneys for Complainant.

ORDER GRANTING WRIT OF ERROR ON CROSS-APPEAL.

The foregoing Petition on Cross-Appeal is granted and the claim of Cross-Appeal therein made is allowed.

Done in open Court this 20th day of June, 1922.

WM. C. VAN FLEET,
District Judge of the said District Court presiding therein.

Service of the foregoing Petition by delivery of a copy thereof, acknowledged this 20th day of June, 1922.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Defendants, DeWitt Garrison Brown and Roosa C. Brown.

By W. D. McREYNOLDS.

Endorsed, Filed June 20, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

ASSIGNMENT OF ERRORS.

Now come DeWitt Garrison Brown and Roose C. Brown, defendants in the above entitled cause, by their attorneys, J. H. Peterson and T. C. Coffin, and in connection with their petitions for a writ of error in this cause assign the following errors, which they, as plaintiffs in error, aver occurred at the trial hereof, and upon which they rely to reserve the judgment entered herein as appears of record:

1. The Court erred as a matter of law in entering judgment in favor of the plaintiff and against these plaintiffs in error for the condemnation of the lands of these plaintiffs in error, upon the ground that the plaintiff is without authority at law to condemn lands for townsite purposes, and the bill of complaint in this cause for said reason fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants and plaintiffs in error.

2. The Court erred as a matter of law in entering judgment in favor of the plaintiff and against these defendants and plaintiffs in error for the reason that Section 7 of the Reclamation Act of June 17, 1902 (32 Stat. at Large, 388) and Sundry Civil Appropriation Bill, approved March 4, 1921 (41 Stat. at Large, 1403), if construed so as to authorize the condemnation of private lands for townsite purposes on behalf of the United States of America, are unconstitutional and void as being beyond the authority granted to the Federal Congress by the Constitution of the United States.

3. The Court erred in holding as a matter of law, on February 10, 1922, as set forth in the decision of the Court that the United States of America, under the provisions of Section 7 of the Reclamation Act of June 17,

1902 (32 Stat. at Large, 388) and Sundry Civil Appropriation Bill, approved March 4, 1921 (41 Stat. at Large, 1403), had authority to exercise the right of eminent domain and condemn the private lands of these plaintiffs in error for townsite purposes.

WHEREFORE, Your petitioners, DeWitt Garrison Brown and Roose C. Brown, plaintiffs in error, pray that the judgment of the District Court of the United States for the District of Idaho, Eastern Division, be reversed and the said Court directed to enter judgment in favor of your petitioners and against the United States of America, the plaintiff, dismissing the said action.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Plaintiffs in Error, Defendants in the Lower Court.
Residence and P. O. Address:
Pocatello, Idaho.

SERVICE of the foregoing ASSIGNMENT OF ERRORS, by receipt of copy thereof, admitted this 19th day of June, 1922.

E. G. DAVIS,
B. E. STOUTEMYER,
Attorneys for Defendants in Error.

Endorsed, Filed June 19, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

ASSIGNMENT OF ERRORS.

AND NOW COMES the United States of America, Defendant in Error on Appeal and Plaintiff in Error on Cross-Appeal, and files this its Assignment of Error on Cross-Appeal.

1. The United States District Court of the District of Idaho, Eastern Division, erred in awarding to the Defendants in addition to the amount found by the jury to be the value of the premises sought to be condemned, the sum of THREE HUNDRED TWENTY-EIGHT AND TWELVE/HUNDREDTHS ($328.12) DOLLARS as interest at the rate of seven (7%) per cent per annum from the date of summons herein until the date of the entry of Judgment.

2. That in view of the fact that the plaintiff did not take possession of the said premises sought to be condemned or interfere in any way with defendants' possession and use thereof, and that the defendants retained possession and the full use and benefit of said premises at all times up to the date of the entry of Judgment, the said Court erred in requiring the plaintiff as a condition to the exercise of its right to condemn said premises, to pay defendants in addition to the value of said premises as found by the jury the said sum of THREE HUNDRED TWENTY-EIGHT AND TWELVE/HUNDREDTHS ($328.12) DOLLARS as interest from the date of summons until the date of Judgment.

3. That the said Court erred in allowing the defendants to retain all the use, benefit and profit of the possession of said premises from the date of summons herein until date of Judgment, and also to receive interest on the value of the premises for the same period.

4. That in view of the said facts in regard to retention of possession by defendants, the said Court erred in inserting in the Judgment herein the words "The interest to which defendants are entitled is hereby found to be the sum of $328.12."

5. That the said Court erred in signing the Judgment requiring the payment of the said sum of THREE HUNDRED TWENTY-EIGHT AND TWELVE/

HUNDREDTHS ($328.12) DOLLARS interest by the plaintiff to the defendants in addition to the value of said premises as found by the jury, or any sum whatever as interest in view of the fact that the defendants during all the said period from the date of summons until the date of Judgments retained possession and the full use and benefit of the possession thereof, and that plaintiff did not take possession thereof or interfere in any way with defendants' possession and use of the said premises.

6. That the said Court erred in signing and entering a Judgment inconsistent with the verdict in the said above entitled cause, in that the said Judgment requires the plaintiff to pay the defendants Three Hundred Twenty-Eight and Twelve/Hundredths ($328.12) Dollars more than the jury in its said verdict found to be the value of the said premises.

E. G. DAVIS,
United States Attorney for the District of Idaho.
B. E. STOUTEMYER,
District Counsel, U. S. Reclamation Service.
Residence, Boise, Idaho.

Dated this 20th day of June, 1922.

Service of the foregoing Assignment of Errors, by delivery of a copy thereof, acknowledged this 20th day of June, 1922.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Defendants, DeWitt Garrison Brown and Roose C. Brown.
Residence: Pocatello, Idaho.
By W. D. McREYNOLDS,

Endorsed, Filed June 20, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

ORDER ALLOWING WRIT OF ERROR, AND FIXING BOND.

Upon motion of J. H. Peterson and T. C. Coffin, torneys for the defendants above named, and upon ing the petition for a writ of error and an assignme of errors and prayer for reversal;

It is ORDERED that a writ of error be, and same is, hereby allowed to have review in the Unit States Supreme Court of the judgment heretofore tered in the above entitled cause on the 25th day March, 1922, in favor of the plaintiff above named a against the defendants, DeWitt Garrison Brown Roosa C. Brown, adjudging and decreeing the conde nation of the land of the said defendants, and that amount of the bond on appeal be, and hereby, is, fix at $1000.00.

Done at Chambers in BOISE, IDAHO, this 19th d of June, 1922.

WM. C. VAN FLEET,
District Judge.

SERVICE of the foregoing ORDER ALLOWIN WRIT OF ERROR AND FIXING BOND, by rece of copy thereof, admitted this 20th day of June, 1922

E. G. DAVIS,
B. E. STOUTEMYER,
Attorneys for Plaintiff.

Endorsed, Filed June 19, 1922.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 306.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, That we, W. M. Davie and Irvin Allred, as sureties, are held and firmly bound unto the United States of America, plaintiff above named, in the sum of $1000.00, to be paid to the United States of America, to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents:

SEALED with our seals, and dated this 19th day of June, 1922.

WHEREAS, The above named DeWitt Garrison Brown and Roosa C. Brown have sued out a Writ of Error to the Supreme Court of the United States to reverse the judgment made and entered in the above entitled Court and cause on the 25th day of March, 1922, decreeing the condemnation of certain lands belonging to the said DeWitt Garrison Brown and Roosa C. Brown;

NOW, THEREFORE, The condition of this obligation is such that if the above named DeWitt Garrison Brown and Roosa C. Brown shall prosecute said Writ to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and virtue.

W. M. DAVIE,
Surety.
IRVIN ALLRED,
Surety.

STATE OF IDAHO,)
) ss.
County of Power)

W. M. Davie and Irvin Allred, whose names are sub-

scribed as sureties to the foregoing undertaking, bei
severally duly sworn, each for himself and not one f
the other, deposes and says: That he is a resident a
freeholder within the State of Idaho, and that he
worth the sum specified in said undertaking as the pe
alty thereof, exclusive of property exempt from exec
tion.

W. M. DAVIE,
IRVIN ALLRED,

SUBSCRIBED and sworn to before me this 19th d
of June, 1922.

T. C. SPARKS,
Notary Public.

(SEAL) Residence: American Falls, Idaho.

The foregoing BOND is approved this .....d
of June, 1922.

.....
District Judge.

The sufficiency of this bond is agreed to.

E. G. DAVIS,
U. S. District Attorney.
B. E. STOUTEMYER,
District Counsel.

Endorsed, Filed June 21, 1922.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 306.

STIPULATION FOR RECORD
ON
RETURN OF WRIT OF ERROR.

IT IS HEREBY STIPULATED AND AGREED,

and between the respective parties to the above entitled action, through their attorneys of record, that the following portions only of the record in said cause shall be certified by the Clerk of the above entitled court to the Supreme Court of the United States in response to the Writs of Error herein, to-wit:

1. Complaint.
2. Answer and Amendment to Answer.
3. Judgment.
4. Bill of Exceptions.
5. Defendants' Petition for Writ of Error.
6. Plaintiff's Petition for Writ of Error on cross-appeal.
7. Defendants' Assignment of Errors on appeal.
8. Plaintiff's Assignment of Errors on cross-appeal.
9. Order allowing Defendants Writ of Error on appeal.
10. Order allowing Plaintiff's Writ of Error on cross-appeal.
11. Bond on Writ of Error.
12. Citation to Plaintiff on Writ of Error.
13. Citation to Defendants on Writ of Error on cross-appeal.
14. All original exhibits.
15. This Stipulation.
16. Verdict of the jury.
17. Writ of Error granted to defendants.
18. Writ of Error granted to plaintiff.

IT IS FURTHER STIPULATED that the evidenc on the issues in regard to the right to condemn and a issues involved in the above entitled cause except th issue of the value of the property, was submitted to th Special Examiner, C. W. McClain, on October 17, 1921 that all of said issues other than the issue of the valu of said premises, were argued before the Court b Counsel for the plaintiff and Counsel for the defend ants, respectively, on November 3, 1921; that on th said 3rd day of November, 1921, the Court allowed th defendants' application to file amendment to its An swer herein, and that the said amendment was filed b the defendants on November 4, 1921.

IT IS FURTHER STIPULATED that the defend ants' proposed Bill of Exceptions was served upon th attorneys for the plaintiff at Boise, Idaho, the 10th da of June, 1922, and that on the 17th day of June, 1922 the plaintiff's amendments to said proposed Bill of Ex ceptions were served upon the attorneys for the defend ants herein, and that the said proposed Bill of Excep tions as submitted to the Court under Stipulation o Counsel for both parties hereto embodies the plaintiff' exceptions as well as the defendants' exceptions, and i to be considered as the Bill of Exceptions for both par ties herein.

Dated this 20th day of June, 1922.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Plaintiffs in Error on appeal and Defendants in Error on cross- appeal.

E. G. DAVIS,
B. E. STOUTEMYER,
Attorneys for Defendant in Error on appeal and for Plaintiff in Error on cross-appeal.

TO THE HONORABLE W. D. McREYNOLDS, Clerk of the above entitled Court:

In accordance with the Writs of Error in the above entitled cause, you are hereby requested to transmit to the United States Supreme Court those portions of the record in said cause which are specified in the foregoing Stipulation, together with all original exhibits.

J. H. PETERSON,
T. C. COFFIN,

Endorsed, Filed June 21, 1922.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

In the Supreme Court of the United States of America.

DeWITT GARRISON BROWN and
ROOSA C. BROWN, his wife,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss:

The President of the United States of America to the Judges of the District Court of the United States for the District of Idaho, Eastern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, plaintiff, and DeWitt Garrison Brown (sometimes known as DeWitt G. Brown) and Roosa C. Brown, his wife, defendants, a manifest error has happened, to the great damage of the said

DeWitt Garrison Brown and Roosa C. Brown as by their complaint appears;

We being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States of America together with this Writ so that you have the same at the City of Washington, D. C. within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the law and custom of the United States should be done.

WITNESS The Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand nine hundred and twenty-two, and the Independence of the United States of America the one hundred and forty-sixth.

W. D. McREYNOLDS,
Clerk of the United States District Court for the District of Idaho.

(SEAL)

The foregoing WRIT is hereby approved.

WM. C. VAN FLEET,
District Judge.

Service of the foregoing WRIT OF ERROR, by receipt of copy thereof, admitted this 20th day of June, 1922.

E. G. DAVIS,
B. E. STOUTEMYER,
Attorneys for Defendant in Error.

Filed June 19, 1922.
W. D. McREYNOLDS, Clerk.

In the Supreme Court of the United States of America.

DeWITT GARRISON BROWN and
ROOSA C. BROWN, his wife,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

CITATION ON WRIT OF ERROR.

THE PRESIDENT OF THE UNITED STATES TO THE UNITED STATES OF AMERICA, and E. G. DAVIS and B. E. STOUTEMYER, Its Attorneys, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in Washington, D. C. within thirty days from the date of this Writ pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Eastern Division, wherein DeWitt Garrison Brown and Roosa C. Brown are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable Frank S. Dietrich, District Judge, this 19th day of June, 1922.

WM. C. VAN FLEET,
United States District Judge.

(SEAL)

ATTEST:

W. D. McREYNOLDS, Clerk.

Filed June 19, 1922.
W. D. McREYNOLDS, Clerk.

In the Supreme Court of the United States of America.

DeWITT GARRISON BROWN and
ROOSA C. BROWN, his wife,
Plaintiff in Error on Appeal.
Defendants in Error on Cross-Appeal.

vs.

UNITED STATES OF AMERICA,
Defendant in Error on Appeal.
Plaintiff in Error on Cross-Appeal.

UNITED STATES OF AMERICA,—ss:

The President of the United States of America to the Judge of the District Court of the United States for the District of Idaho, Eastern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, Plaintiff, and DeWitt Garrison Brown (sometimes known as DeWitt C. Brown) and Roosa C. Brown, his wife, Defendants, a manifest error has happened, to the great damage of said Plaintiff, United States of America, as by its complaint appears;

We being willing that such error, if any hath been, should be duly corrected and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States of America together with this Writ so that you have the same at the City of Washington, D. C. within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the law and custom of the United States should be done.

WITNESS, The Honorable William H. Taft, Chief Justice of the Supreme Court of the United States this 20th day of June, in (SEAL) the year of our Lord one thousand nine hundred and twenty-two, and the Independence of the United States of America the one hundred and forty-sixth.

W. D. McREYNOLDS,
Clerk of the United States District Court for the District of Idaho.

The foregoing WRIT is hereby approved.

WM. C. VAN FLEET,
District Judge.

SERVICE of the foregoing WRIT OF ERROR, by receipt of copy thereof, admitted this 20th day of June, 1922.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for DeWitt Garrison Brown and Roosa C. Brown.

Plaintiffs in error on appeal.
Defendants in error on cross-appeal.

By W. D. McREYNOLDS,

Filed June 20, 1922.
W. D. McREYNOLDS, Clerk.

In the Supreme Court of the United States of Americ

DeWITT GARRISON BROWN and
ROOSA C. BROWN, his wife,
Plaintiffs in Error o
Appeal.
Defendants in Error o
Cross-Appeal.

vs.

UNITED STATES OF AMERICA,
Defendant in Error o
Appeal.
Plaintiffs in Error o
Cross-Appeal.

THE PRESIDENT OF THE UNITED STATES T
DEWITT GARRISON BROWN AND ROOSA C
BROWN, and J. H. PETERSON AND T. C. COF
FIN, Their Attorneys, Greetings:

You are hereby cited and admonished to be and ap
pear in the Supreme Court of the United States i
Washington, D. C. within thirty days from the date o
this Writ pursuant to a Writ of Error filed in th
Clerk's office of the District Court of the United State
for the District of Idaho, Eastern Division, wherein th
United States of America is Plaintiff in Error on cros
appeal and you are Defendants in Error on cross-appea
to show cause, if any thereby, why the judgment re
dered against the said Plaintiff in Error, United State
of America, as in said Writ of Error mentioned, shoul
not be corrected, and why speedy justice should not b
done to the parties in that behalf.

WITNESS, The Honorable William C. Van Fleet, District Judge, this 20th day of June, 1922.

(SEAL) WM. C. VAN FLEET,
United States District Judge.

ATTEST:
W. D. McREYNOLDS, Clerk.

SERVICE of the above and foregoing CITATION ON WRIT OF ERROR, by receipt of copy thereof, admitted this 20th day of June, 1922.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for DeWitt Garrison Brown and Roosa C. Brown, Defendants in Error on Cross-Appeal.
By W. D. McREYNOLDS.

(Title of Court and Cause.)

No. 306.

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 53, inclusive, to be full, true and correct copies of the pleadings and proceeddings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the Supreme Court of the United States, as requested by the Stipulation for Record filed herein.

I further certify that the cost of the record herein amounts to the sum of $113.15, and that the same has been paid by the plaintiffs in error.

Witness my hand and the seal of said Court this 20th day of July, 1922.

(SEAL) W. D. McREYNOLDS,
Clerk.
By Pearl E. Zanger,
Deputy Clerk.

Endorsed on cover: File No. 29,079. Idaho D. C. U. S. Te
No. 529. De Witt Garrison Brown and Roosa C. Brown, plaintiffs
error, vs. The United States of America. Term No. 530. T
United States of America, plaintiff in error, vs. De Witt Garr
Brown and Roosa C. Brown. Filed August 5th, 1922. File N
29,079, 29,080.

(7701)

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In the
Supreme Court of the United States

OCTOBER TERM, 1923.

DEWITT GARRISON BROWN AND ROOSA C. BROWN, Plaintiffs in Error,

v.

THE UNITED STATES OF AMERICA.

No. 97.

THE UNITED STATES OF AMERICA, Plaintiff in Error,

v.

DEWITT GARRISON BROWN AND ROOSA C. BROWN.

No. 98.

In Error to the District Court of the United States from the District of Idaho.

BRIEF FOR DEWITT GARRISON BROWN AND ROOSA C. BROWN.

STATEMENT

This case comes to this court from the District of Idaho direct, on the ground that it involves the construction and application of the Constitution of the United States and the validity of a statute of the United States. Judicial Code, 238.

The proceeding was to condemn lands under th National Irrigation Act of June 17, 1902 (32 Stat 388), and acts amendatory thereof and supple mentary thereto. The right to condemn and the cir cumstances under which the condemnation is at tempted are set out in a letter from the First Assist ant of the Secretary of the Interior to the Attorne General, dated April 21, 1921, and is as follow (R. 20):

> Under the authority of the National Irriga tion Act of June 17, 1902 (32 Stat. 388), an acts amendatory thereof or supplementar thereto, the United States Reclamation Servic is now engaged in work preliminary to the con struction of a large dam across the Snake Rive at American Falls, Idaho, which dam is intende to be used in connection with an extension of th Minidoka Federal Irrigation project.
>
> The proposed reservoir would flood a majo portion of the land now included within the cor porate limits of the City of American Falls, town of about 1,500 people. Our plan is to de velop a new town just outside the limits of th present town and above the high-water line o the proposed reservoir, purchasing or condemn ing the lands within the submerged area and where practicable, making an exchange of lot and removing houses and other improvement from the old town site to the new town site. A adjustment of this kind would permit the Gov ernment to secure the required area for the res ervoir at much less expense than would other wise be the case, and consequently would mak the construction of the reservoir more feasibl through a reduction of the cost.

The Sundry Civil Appropriation Act of March 4, 1921 (41 Stat. 1367, 1403), contains the following provision:

"Minidoka project, Idaho: For the operation and maintenance, continuation of construction, and incidental operations with authority in connection with the construction of the American Falls Reservoir, to purchase or condemn and to improve suitable land for a new town site to replace the portion of the town of American Falls which will be flooded by the reservoir, and to provide for the removal of buildings to such new site and to plat and to provide for appraisal of lots in such new town site, and to exchange and convey such lots in full or part payment for property to be flooded by the reservoir, and to sell for not less than the appraised valuation any lots not used for such exchange, $1,735,000, together with the unexpended balance of the appropriation for this project for the fiscal year 1921."

The United States has already acquired by purchase 495 acres of land for the proposed new town site and desires to secure title to an additional and adjoining 120 acres owned by DeWitt G. Brown, in order to make the town site of sufficient size to meet the needs above described. * * *

The United States has attempted to acquire title to the lands in question, but has been unable to agree with the owner upon a purchase price. The estimated value of the land is less than $12,000, and the Reclamation Service has available a sufficient amount of unencumbered funds to meet any court award that might be made in proceedings brought to secure the condemnation of said property.

> I find that the United States requires the 120 acres of land above described for a town site as an incident to making more feasible the construction of the proposed American Falls dam for Federal irrigation purposes, and accordingly it is requested, under the authority of Section 7 of said Act of June 17, 1902, that you instruct the United States Attorney for the District of Idaho to cause proceedings to be commenced for condemnation of the lands in question, and that in such proceedings fee simple title be secured to the United States.

Condemnation proceedings were instituted under the instructions contained in the above letter. The defense was interposed that the proposed condemnation was not for a public purpose and questioning the right of the United States to condemn for town site purposes, but the court below rendered an opinion upholding the right of the United States to take the land for the purposes specified. (R. 30).

The jury then found the value of the land as of June 21, 1921, when the summons was issued, to be $6,250, the court having reserved for its own determination the question of interest, under agreement of counsel in open court. The court then added to the amount found by the jury, the sum of $328.12 as interest from the service of summons to the date of the final determination, and entered judgment accordingly. The sole questions raised by the defendants' assignments of error are as to the power of the United States to condemn land for the purposes indicated and as to the validity of the Act of Congress authorizing the condemnation. The sole question raised by the Government is the correctness of the

part of the judgment awarding interest to the defendants.

ASSIGNMENTS OF ERROR

The plaintiffs in error assigned the following errors:

1. The Court erred as a matter of law in entering judgment in favor of the plaintiff and against these plaintiffs in error for the condemnation of lands of these plaintiffs in error, upon the ground that the plaintiff is without authority at law to condemn lands for town site purposes, and the bill of complaint in this cause for said reason fails to state facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants and plaintiffs in error.

2. The Court erred as a matter of law in entering judgment in favor of the plaintiff and against these defendants and plaintiffs in error for the reason that Section 7 of the Reclamation Act of June 17, 1902 (32 Stat. at Large, 388) and Sundry Civil Appropriation Bill, approved March 4, 1921 (41 Stat. at Large, 1403), if construed so as to authorize the condemnation of private lands for town site purposes on behalf of the United States of America, are unconstitutional and void as being beyond the authority granted to the Federal Congress by the Constitution of the United States.

3. The Court erred in holding as a matter of law,

on February 10, 1922, as set forth in the decisio
the court that the United states of America, un
the provisions of Section 7 of the Reclamation Ac
June 17, 1902 (32 Stat. at Large, 388) and Sun
Civil Appropriation Bill, approved March 4, 1
(41 Stat. at Large, 1403), had authority to exer
the right of eminent domain and condemn the
vate lands of these plaintiffs in error for town
purposes.

ARGUMENT.

UNITED STATES IS WITHOUT POWER CONDEMN LAND FOR THE PURPOSES A TOWN SITE UNDER THE CIRCU STANCES SET OUT IN THE RECORD.

The Government condemned land required reservoir purposes, and its right to do this we do question. It is proposed now to condemn land a cent to such reservoir site for the purpose of

> * * * making an exchange of lots and moving houses and other improvements from old town site to the new town site" (plaint Ex. B, R. 20), and to provide for the remova buildings to such new town site, and to plat to provide for appraisal of lots in such new t site, and to exchange and convey such lots in or part payment for property to be flooded the reservoir, and to sell for not less than the praised valuation any lots not used for such change. * * * (Plaintiffs' Ex. B., R. 2

The plaintiffs in error are the owners of 120 acres included within the proposed new town site.

It is fundamental that private property cannot be condemned for private use. The difficulty in this case comes through applying this rule. The Government contends that the property of the plaintiffs in error sought to be taken for the purposes above indicated are required for a public use, while this proposition is denied by the plaintiffs in error. To define what is a public use has been found very difficult, if not impossible, by the best judicial minds. It has been found much easier to define what is not a public use.

There seem to be two well defined definitions of the term "public use." it has been held that even the convenience of the state or its inhabitants would warrant the exercise of the power (20 *C. J.* 554, citing *Pittsburgh* v. *Scott*, 1 Pa. 309), while other courts have adopted a stricter meaning, holding in effect, that public use means use by the public. 20 *C. J.* 554. The latter doctrine seems to have been followed by most of the state courts. *Lewis Eminent Domain*, Vol. 1, Sec. 1.

Judge Cooley, in his work on Constitutional Limitations, defines eminent domain as

> * * * the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common and to appropriate and control individual property for the public benefit and as the public safety, necessity, conven-

> ience, and welfare demand. *Cooley's Constitutional Limitations*, p. 524.

The plaintiffs in error feel that they are not concerned vitally with the various definitions which have been given to define the power of eminent domain, because it seems that under the most liberal definitions the taking proposed in this action could not be construed to be for a public use.

"It is conceded on all hands," says Judge Cooley, "that the legislature has not power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit." *Cooley's Constitutional Limitations*, 6th ed., p. 651.

The public use necessary to the Government's right cannot be found in the business speculation involved in the transaction, because as the court below very well said:

> The town site may or may not be profitable; the promotion of such enterprises is necessarily a speculative and hazardous business. But assuming that it will be profitable, an enterprise by which private property is taken for essentially private uses is not rendered public by the fact that the incident profit is to be applied to public purposes. Were the proposed use of an expected profit the criterion, the right of the Government to take private property would be practically unlimited. It might condemn not only the requisite for a post office, but likewise an indefinite amount of other property, merely to be sold back into private ownership, at a profit out of which to pay for the site.

It is said by Mr. Nichols in his work on *Eminent Domain*, (p. 178):

> If the proposed taking savors at all of municipal land speculation, no court would hesitate to hold it unconstitutional.

If there is any other purpose in the Government's condemnation of this land except a desire to salvage a portion of the movable property in the old town site and a generally wholesome desire to reduce the expenditure of a valuable public improvement, it must be found in the solicitude of the Government for the residents of the old town site. This likewise cannot be construed to be a public use because in any event its benefit accrues to a very limited number of people. While it is true, as the Solicitor General says, in his brief, that the subject of the exercise of the power of eminent domain furnishes a striking illustration of how legislation and decision follow and adapt themselves to the exigencies of the rapid development of modern society, nevertheless there would seem to be necessarily some limit beyond which even the Federal Government should not be permitted to go in taking private property under an "exigency created by rapid development."

There are no adjudicated cases which we have been able to find squarely in point on this case. The most helpful cases, we believe, and those essentially similar in point of reasoning are those cases holding that

> * * * where property is taken for the public use, there cannot at the same time be taken an additional adjacent property which it is not

intended to devote to the public use but which is to be sold for profit as soon as the improvement is completed. *Nichols on Eminent Domain* (p. 149); *Chicago, etc., Ry. Co.* v. *Cicero*, 41 N. E. (Ill.) 640; *Salisbury Land & Improvement Co.* v. *Commonwealth*, 102 N. E. (Mass.) 619; *Jones* v. *Tetham*, 20 Pa. 389; *Opinion of Justices*, 204 Mass. 607, 91 N. E. 405.

In the last cited case, the House of Representatives of the State of Massachusetts requested of the Supreme Judicial Court of that Commonwealth an opinion concerning the power of the legislature to authorize the City of Boston to secure by the power of eminent domain land to be leased for business purposes. The question involved the right of the City of Boston to condemn certain lands for a thoroughfare and to take not only the land or easements necessary for the same, but also such quantities of land on either side of said thoroughfare or between the same and other streets as might be reasonably necessary for purposes in the submission referred to, with a view to the subsequent use by private individuals of so much of the property taken as lies on either side of the thoroughfare under conveyances, leases or agreements, which should embody suitable provision for the construction on the said land of buildings suited to the objects and purposes set out, and for the use, management and control of the said lands and buildings in such manner as to secure and best promote the public interest. The reasoning of this case applies so nearly to the case at bar that we quote the same in full here.

The Justices returned the following answer:

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

We, the justices of the Supreme Judicial Court, have considered the question submitted to us, a copy of which is hereto annexed, and we answer it as follows:

The question relates to the proposed laying out of a thoroughfare or street through a part of the City of Boston. The power of the city, by its officers, to lay out and construct a street or thoroughfare in any place within the city, or of any width or mode of construction, if it is found that the public necessity and convenience require it, is undoubted. Rev. Laws, Chap. 48, Sec. 1; Stat. 1891, Chap. 323; Stat. 1902, Chap. 521; Stat. 1904, Chap.443.

The question seems to relate particularly to the power of the legislature to take and use land outside of the proposed thoroughfare, for purposes which have no direct relation to the construction or use of the street for travel. It is presented upon the hypothesis that the desired facilities for the profitable use of the land can be secured only by the obliteration in whole or in part of the present lines of individual ownership along the street, the concentration, through the exercise of the power of eminent domain, of these abutting estates in parcels of suitable size and shape, and the development or use of such parcels for warehouses, mercantile establishments, and other buildings suited to the demands of trade and commerce. The question is whether such land can be taken with a view to the subsequent use of it by private individuals, under conveyances, leases or agreements which shall embody suitable contracts for the construction on the land of buildings adapted to use in

domestic and foreign trade and commerce, and for the use, management and control of the lands and buildings in such manner as to secure and promote such trade and commerce. The proposed legislation to which the inquiry relates necessarily would contemplate action by the city, in the procurement, management, and control of land along a street within the city, for no other purpose than to induce and promote a use of it by merchants or traders. It would contemplate a taking of private property in the exercise of the right of eminent domain, and an expenditure of money to pay for it and fit it for occupation.

It is a rule of law universally recognized in this country, that neither of these things can be done unless the taking or expenditure is for a public use. This has been stated so often, and the principles on which it is founded have been considered so fully, that it is unnecessary to discuss it or to cite authorities. The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of the property to obtain the possible income or profit that might inure to the city from the ownership and control of it would not be a public use. The city cannot be authorized to take the property of a private owner for such a purpose, nor can the city tax its inhabitants to obtain money for such a use. It could as well tax them to raise money to carry on any other private business with the hope of gain. Such proceedings are entirely outside the functions of a state or of any subdivision of a state.

It is equally true and indubitable that a management and use of such property to promote the interests of merchants or traders who might oc-

cupy it, and to furnish better facilities for doing business and making profits, would not be a public, but a private use of the real estate. In *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39, after the great fire of 1872, which destroyed all the buildings in an important part of Boston, it was decided that a statute authorizing the city to borrow money on bonds, and lend it on mortgages to the owners of land whose buildings had been burned, was unconstitutional. The lending of such money presumably would have promoted building and the transaction of business in the devasted district, but the benefit to the public would not have been direct, but only incidental. The court said, speaking by Mr. Justice Wells at page 461 of 111 Mass.: "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests and the property of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." This statement of the law is clear and accurate. It has governed all later decisions upon kindred questions in this common-

wealth. *Opinion of Justices*, 155 Mass. 598, 1
L. R. A. 809, 30 N. E. 1142; *Mead* v. *Acton*, 1
Mass. 341, 1. N. E. 413. It is the law of the S
preme Court of the United States as laid dow
in an able and exhaustive opinion by Mr. Justi
Miller, in *Citizens' Sav. & L. Asso.* v. *Topek*
20 Wall. 655, L. ed. 455, in which it was he
that a statute authorizing a town to issue i
bonds in aid of a manufacturing enterprise w
invalid. It has been followed by that court
later cases. *Parkersburg* v. *Brown*, 106 U.
487, 27 L. ed. 238, 1 Sup Ct. Rep. 442; *Cole*
La Grange, 113 U. S. 1, 28 L. ed. 896, 5 Sup. C
Rep. 416; *Missouri P. R. R. Co.* v. *Nebrask*
164 U. S. 403, 41 L. ed. 489, 17 Su
Ct. Rep. 130. It has been applied
different forms in a variety of cases
courts all over the United States. *Opinion*
Justices, 58 Me. 590; *Allen* v. *Jay*, 60 Me. 12
11 Am. Rep. 185; *Markley* v. *Mineral City*,
Ohio St. 430, 65 Am. St. Rep. 776, 51 N. E. 2
State ex rel Griffith, 27 L. R. A. (N. S.),....
Osawkee Twp., 14 Kan. 418, 19 Am. Rep. 9
Central Branch Union P. R. R. Co. v. *Smith*,
Kan. 745; *Coates* v. *Campbell*, 37 Minn. 498,
N. W. 366; *William Deering & Co.* v. *Peters*
75 Minn. 118, 77 N. W. 568; *Minnesota Sug*
Co. v. *Iverson*, 91 Minn. 30, 97 N. W. 454; *E*
fala v. *McNab*, 67 Ala. 588, 42 Am. Rep. 11
Manning v. *Devil's Lake*, 13 N. D. 47, 65, L.
A. 187, 112 Am. St. Rep. 652, 99 N. W. 51; *Mi*
igan Sugar Co. v. *Auditor General*, 124 Mi
674, 56 L. R. A. 329, 83 Am. St. Rep. 354,
N. W. 625; *Deal v. Mississippi County*, 107 M
464, 14 L. R. A. 622, 18 S. W. 24, *Feldman*
Charleston, 23 S. C. 57, 55 Am. Rep. 6; *Suth*
land-Innes Co. v. *Evart*, 30 C. C. A. 305, 58 U.
App. 335, 86 Fed. 597.

In *Atty. Gen.* v. *Eau Claire*, 37 Wis. 400, 4

it was held that a statute authorizing a municipality to build a dam for the purpose of letting water power to manufacturing industries was void. In *Mather* v. *Ottawa*, 114 Ill. 659, 666, 3 N. E. 216, 219, a similar case, the court said: "It may be, and probably is, true that the contemplated improvement of the water power on the Illinois and Fox Rivers, in the City of Ottawa, if it had been judiciously and properly carried out, might have built up the city, and added greatly to its general growth, welfare, and prosperity; but the establishment of any kind of manufactures which employed capital and labor within the city might have produced the same result, and yet the city would have had no power to impose taxes to raise money to be devoted to such purposes." In *Dodge* v. *Mission Twp.*, 54 L. R. A. 242, 46 C. C. A. 661, 107 Fed. 827, the Circuit Court of Appeals decided that a statute authorizing the levy of a tax for the promotion of the construction of factories to manufacture sorghum cane into sugar was invalid. In dealing with the proposed taking of stock in a great manufacturing enterprise, the court said, in *Weismer* v. *Douglas*, 64 N. Y. 91-102, 21 AM. Rep. 586: "Any such enterprise tends indirectly to the benefit of every citizen, by the increase of general business activity, the greater facility of obtaining employment, the consequent increase of population, the enhancement in value of real estate and its readier sale, and the multiplication of conveniences. But these are not the direct and immediate public uses and purposes to which money taken by tax may de directed."

Cases which have sustained statutes on the ground that the use for which the money was to be expended was public are clearly distinguishable from the considerations which are presented

hypothetically by this question. An illustration is found in the many decisions holding that cities and towns may be permitted to aid in the construction of railroads. A railroad is a great highway for use by the public. Another illustration is furnished by the decisions that the establishment of irrigation districts under legislative authority for the improvement of large areas of arid and worthless land, is allowable. *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Talbot* v. *Hudson*, 16 Gray, 417, was treated by the court as governed by similar principles.

The decision in *Moore* v. *Sanford*, 151 Mass. 285, 7 L. R. A. 151, 24 N. E. 323, rests upon the ground that the work done was in a true sense for the promotion of commerce, through its direct and close relation to the improvement of Boston harbor, in making connections between the great highways used for interstate commerce and the numerous ships that are passing back and forth between Boston and foreign ports. All that was done was held to be fairly incidental to the main purpose of promoting commerce between the United States and distant countries. The improvement of harbors and the construction of public docks, wharves and possibly of warehouses, to be used, under governmental authority, as a part of the facilities for the transportation of merchandise in commercial enterprises, and the building of railroads to be used for the same object, may all affect the public so directly as to constitute a public purpose for which money raised by taxation may be expended.

The question before us refers to trade and commerce in connection with the use of land for

buildings along the sides of a street through a busy part of Boston. In Webster's International Dictionary "commerce" is defined as "the exchange of merchandise on a large scale between places or communities." Under the Constitution of the United States, Congress is given the exclusive right to legislate for the regulation of interstate or foreign commerce. The use of buildings along such a thoroughfare as is proposed presumably would be chiefly for trade, the buying and selling of goods, and perhaps, to some extent, for the business of manufacturing. We do not think this is commerce in such a sense that money can be raised by taxation for the promotion of it, as it can be raised for the improvement of a harbor or the construction of a railroad. In reference to the interest of the public in it, it stands no differently from other useful kinds of business.

An affirmative answer to this question would make it possible for the city to take the home of a resident near the line of the thoroughfare, or the shop of a humble tradesman, and compel him to give up his property and go elsewhere, for no other reason than that, in the opinion of the authorities of the city, some other use of the land would be more profitable and therefore would better promote the prosperity of the citizens generally. We know of no case in which the exercise of the right of eminent domain, or the expenditure of public money, has been justified on such grounds.

Statutes of New York authorized a corporation to construct and maintain "basins, docks, wharves, and piers, and to erect thereon suitable warehouses, mills, furnaces, foundries, factories, shops, and such other buildings as might

be necessary and proper for docking, loading and unloading vessels, for the storage of goods and for the carrying on generally the business of a dock, warehousing and manufacturing company, and in any and every other proper and suitable way promoting and increasing the facilities for commerce, manufacture, and business generally," and to take lands for that purpose. *In re Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42, 48, 49, the latest of these statutes authorizing the taking of land was held unconstitutional. The court said: "The fact that the use to which the property is intended to be put, or the structure intended to be built thereon, will tend incidentally to benefit the public by affording additional accommodations for business, commerce, or manufacture, is not sufficient to bring the case within the operation of the right of eminent domain, so long as the structures are to remain under private ownership and control, and no right to their use or to direct their management is conferred upon the public." The court expressly refrained from considering whether, if the authority were to construct a "basin and wharves to the use of which the public would be entitled, under regulations to be established by public authority, the use would be a public one," and whether the "addition to such powers, of the right to establish private warehouses, shops, mills, or factories, and to carry on the business of a docking, warehousing, and manufacturing company," would invalidate the delegation to the company of the right of eminent domain.

The case of *Re New York*, 157 N. Y. 409, 52 N. E. 1126, s. c. 28 App. Div. 143, 52 N. Y. Supp. 588, has little relevancy to the subject before us. In the City of New York, the fee of the land in

the public streets is in the city when they are laid out in the ordinary way and is in private ownership when they are laid by dedication. A statute providing for the disposition of the land in connecting streets which are discontinued in the laying out of a new street was held constitutional. It was a reasonable provision for the disposition of this land, the fee of which, in most cases, would be in the city, subject to easements of adjacent owners. It was entirely incidental to the main purpose of the statute, and in principle, although unlike it in detail, it was similar to our Stat. 1904 Chap. 443.

We answer the question in the negative.

Marcus P. Knowlton,
James M. Morton,
John W. Hammond,
William Caleb Loring,
Henry K. Braley,
Henry N. Sheldon,
Arthur Prentice Rugg.

The same doctrine was followed later by that court in an adjudicated case, *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371, 102 N. E. 619. To the same effect, also, is the case of the *City of Richmond* v. *Carneal* (Va.), 106 S. E. 403.

It is clear, we think that the right of the Government to condemn the land in question must be denied unless the project contemplates the use of the

said land in some intimate manner connected with the construction of the reservoir in question, and the Government in this case provides us with no such connection.

The Government, after the condemnation of the land in question, if it is permitted, cannot be compelled to sell the land. The public at large would have no interest in the land. A person whose land has been condemned in the old town site would have no vested right in the land condemned in the new town site. The price to be charged by the Government for land which remains after it has concluded its exchanges is to be at the Government's option, for such price as the Government may desire, to such persons as it may desire to sell. In condemning this land the Government does not desire to retain it but to dispose of it and this disposition to the public is not, and cannot be, a public use. No agent or instrumentality of the Government intends or proposes to use the land in question. As a speculation on the part of the Government, this enterprise may be profitable and it may be otherwise, but whether the Government makes money or loses money on the transaction cannot affect the question of whether the land is being taken for a public use.

Some evidence was introduced below that the land in question would be needed for homes for a number of workmen to be employed upon the dam, but it is thought that very little attention need be given to this point. The evidence contained in the record shows that the land in question is further from the

proposed dam than any other land in the new town site. (R. 20). The defendant's Exhibit 1, shown at R. 20, which is an official plat of the proposed new town site, shows the land in question to be cut up into lots and blocks and platted as a part of the new town site. We believe the evidence shows that this purpose on the part of the Government is very shadowy and unsubstantial. The court below disposed of this contention, without reference to the evidence, as follows:

> It is also alleged that in part the land is desired for the temporary housing of workmen to be employed in constructing the dam. But there is no attempt either in the pleading or in the evidence to segregate or describe the area desired for that purpose. Moreover, there seems to be no competent authority for such an averment. The testimony as to the plans and purposes of the Government is only that of a local engineer of the Reclamatoin Service, who manifestly is without authority to speak on the subject. I am not unmindful of the rule recognized in Forbes v. United States, 268 Fed. 273, and the cases therein cited, but of course, the presumption there indulged is not conclusive. As a part of the evidence here submitted we find a certified copy of a letter written April 21, 1921, by the First Assistant Secretary of the Interior to the Attorney General, stating that the land is desired for the new town site and requesting the latter to direct the District Attorney of Idaho to bring the suit; no other intended use is intimated. This letter was introduced by plaintiff, and presumably it is the warrant, and the only warrant, for the commencement of the action. Neither the District Attorney by averment nor

> the engineer of the local Reclamation Service by speculation as to the manner in which the construction work will probably be prosecuted, can add to or modify the purpose for which the land is sought, as such purpose is declared by the only officer having the requisite authority.

It is well settled that the question whether the purpose of a taking is a public one, is judicial. *Hairston* v. *Danville, etc., R. R. Co.*, 208 U. S. 398. And while it is admitted that the necessity and the extent of the taking is a legislative question, we believe that the extent of the taking is limited at all times to the use to which it is intended to put the property, and that if it be construed that the Act of Congress applicable to this case declared the use in question a public one, that such a declaration is palpably without reasonable foundation. While we have not found a case where the United States Government itself has undertaken to condemn property for private uses and purposes analogous to the case at bar, yet the Government is governed by the same doctrines and rules of law that apply to lesser governmental instrumentalities.

There remains, then, only the question as to whether the court below erred in allowing interest to the plaintiffs in error from the time of the isssuance of the summons in the condemnation case, this point being raised by the Government in its assignment. While it is true that the Government did not take actual physical possession of the land in question at the time of the issuance of the summons, still the record shows (p. 20, defendant's Exhibit 1)

that the official plat in question had been prepared and adopted by the Government agent long before the action was instituted, which would seem to be tantamount to taking physical possession. (R. 29, paragraph 19). The use of this farm land by the plaintiffs in error could not be advantageously had after the definite announcement of policy on the part of the United States, and undoubtedly such was the view of the learned court below and his reasons for allowing interest from the time of issuance of summons.

The question of allowing interest on the award from the date of the issuance of summons under the statute of Idaho was before the Circuit Court of the Ninth Circuit in the case of *Weiser Valley Land & Water Co.* v. *Ryan*, reported at 190 Fed. 417, and the court disposed of the question in the following language:

> The next contention is that the court erred in adding interest to the amount of the assessment from the date of the summons. Under the statute, the right to the compensation shall be deemed to have accrued at the date of the summons. Having such right to a compensation at a given time, it would seem that the owner ought to have interest upon the amount ascertained until paid. In the meanwhile he can claim nothing for added improvements, nor is he entitled to any advance that might affect the value of the property. For authorities of same application, see *Reed v. Chicago, M. & St. P. Ry. Co.* (C. C.), 25 Fed. 886; *St. Louis, E. R. & W. Ry. Co.* v. *Oliver*, 17 Okla. 589, 87 Pac. 423; *Warren* v. *St. Paul & Pacific R. R. Co.*, 21 Minn. 424.

The statute of Idaho to which the court had reference in this opinion is Section 7415 of the Idaho Compiled Statutes, and is as follows:

> Sec. 7415. Same: Date of Accrual. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the last section. No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages.

It would seem, therefore, that the court committed no error in awarding interest from the date of the summons.

The judgment should be reversed with instructions to dismiss.

Respectfully submitted,

J. H. PETERSON,

T. C. COFFIN,

Attorneys for Plaintiffs in Error.

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In the Supreme Court of the United States

OCTOBER TERM, 1923.

DEWITT GARRISON BROWN AND ROOSA C. BROWN, plaintiffs in error, v. THE UNITED STATES OF AMERICA. — No. 97.

THE UNITED STATES OF AMERICA, PLAINTIFF in error, v. DEWITT GARRISON BROWN AND ROOSA C. BROWN. — No. 98.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The case comes to this court from the District Court direct, on the ground that it involves the construction and application of the Constitution of the United States and the validity of a statute of the United States. Judicial Code, 238.

The proceeding was to condemn lands for the purposes of the Reclamation Service, and the basic

matters affecting the right to condemn are set out in a letter from the First Assistant Secretary of the Interior to the Attorney General, dated April 21, 1921, which contained the following (R. 20):

> Under the authority of the National Irrigation Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, the United States Reclamation Service is now engaged in work preliminary to the construction of a large dam across the Snake River at American Falls, Idaho, which dam is intended to be used in connection with an extension of the Minidoka Federal Irrigation project.
>
> The proposed reservoir would flood a major portion of the land now included within the corporate limits of the City of American Falls, a town of about 1,500 people. Our plan is to develop a new town just outside the limits of the present town and above the high-water line of the proposed reservoir, purchasing or condemning the lands within the submerged area and, where practicable, making an exchange of lots and removing houses and other improvements from the old town site to the new town site. An adjustment of this kind would permit the Government to secure the required area for the reservoir at much less expense than would otherwise be the case, and consequently would make the construction of the reservoir more feasible through a reduction of cost.
>
> The Sundry Civil Appropriation Act of March 4, 1921 (41 Stat. 1367, 1403), contains the following provision:

"Minidoka project, Idaho: For operation and maintenance, continuation of construction, and incidental operations, with authority in connection with the construction of American Falls Reservoir, to purchase or condemn and to improve suitable land for a new town site to replace the portion of the town of American Falls which will be flooded by the reservoir, and to provide for the removal of buildings to such new site and to plat and to provide for appraisal of lots in such new town site, and to exchange and convey such lots in full or part payment for property to be flooded by the reservoir, and to sell for not less than the appraised valuation any lots not used for such exchange, $1,735,000, together with the unexpended balance of the appropriation for this project for the fiscal year 1921."

The United States has already acquired by purchase 495 acres of land for the proposed town site and desires to secure title to an additional and adjoining 120 acres owned by DeWitt G. Brown, in order to make the town site of sufficient size to meet the needs above described. * * *

The United States has attempted to acquire title to the lands in question, but has been unable to agree with the owner upon a purchase price. The estimated value of said land is less than $12,000, and the Reclamation Service has available a sufficient amount of unencumbered funds to meet any court award that might be made in proceedings brought to secure the condemnation of said property.

> I find that the United States requires the 120 acres of land above described for a town site as an incident to making more feasible the construction of the proposed American Falls dam for Federal irrigation purposes, and accordingly it is requested, under the authority of Section 7 of said Act of June 17, 1902, that you instruct the United States Attorney for the District of Idaho to cause proceedings to be commenced for condemnation of the lands in question, and that in such proceedings fee simple title be secured to the United States.

About 640 acres, being about three-fourths of the present town site, will be flooded (R. 23) and this will require the removal of about 1,125 people (R. 28). The new town site selected is smaller than the flooded portion of the old town site. (R. 24, 25.)

The court below rendered an opinion upholding the right of the United States to take the land for the purpose specified in the act of Congress. (R. 30; 279 Fed. 168.)

A jury then found the value of the land, as of June, 1921, when the summons was issued, to be $6,250. The court having reserved for its own determination the question of interest, then added to the amount found by the jury the sum of $328.12 as interest from the service of summons to the date of the final determination, and entered judgment accordingly.

The sole questions raised by the defendants' assignments of error are as to the power of the United States to condemn the lands for the purposes indi-

cated, and as to the validity of the act of Congress authorizing the condemnation.

The sole question raised by the assignments of error of the United States is as to the correctness of that part of the judgment awarding interest on the value of the land as found by the jury.

ARGUMENT.

I.

The United States has power to condemn lands for purposes of a town site under the circumstances shown by the act of Congress and the Secretary's letter.

The necessity for the taking and the use to be made of the property had its origin in exceptional circumstances connected with recent extensions of governmental activities. But the courts apply old principles to the new conditions and "organic relations of modern society." *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30, 32. "Governmental power must be flexible and adaptive." *Eubank* v. *Richmond*, 226 U. S. 137, 143. It is fundamental that private property can not be condemned for private use, and cases applying that principle are numerous. But in determining whether a particular use or purpose is public or private two principles are to be kept in mind.

1. When the sovereign itself seeks to exercise the power of eminent domain the presumption that the intended use is a public one is much stronger than in cases where private corporations seek to condemn

under authority delegated to them by the sovereign. *United States* v. *Gettysburg Electric Ry. Co.*, 160 U. S. 668, 680.

2. When the legislature itself expressly declares the purpose or use to be a public one, or, what amounts to the same thing, expressly authorizes a taking for a use specifically described, its judgment will be accepted by the courts, unless the use is palpably without reasonable foundation. In such cases the question becomes one of the constitutionality of the statute authorizing the taking; every intendment is in favor of its validity; and it will be sustained unless shown to be clearly and unmistakably invalid. The *Gettysburg case*, *supra*, p. 680; *Sweet* v. *Rechel*, 159 U. S. 380, 392, 393; *Shoemaker* v. *United States*, 147 U. S. 282, 297; *Mt. Vernon Cotton Co.* v. *Alabama Power Co.*, 240 U. S. 30, 32; *Union Lime Co.* v. *Chicago & N. W. Ry. Co.*, 233 U. S. 211, 218.

Both these rules apply to the present case. The United States itself is condemning the lands; and Congress specially authorized the taking and specifically described the purpose and use.

In the *Gettysburg case* the court said (p. 680):

> In these acts of Congress and in the joint resolution the intended use of this land is plainly set forth. It is stated in the second volume of Judge Dillon's work on Municipal Corporations (4th ed. sec. 600), that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be

palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.

As just compensation, which is the full value of the property taken, is to be paid, and the amount must be raised by taxation where the land is taken by the government itself, there is not much ground to fear any abuse of the power. The responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right. It is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself.

In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.

If it be said that the United States is not itself to actually and finally use or occupy the lands either by its agents or employees, or by any structure directly connected with the exercise of its sovereign or proprietary powers, the answer is that the same was true of the property condemned in the *Gettysburg*

case and in *Shoemaker* v. *United States*, 147 U. S. 282. In the former the lands and property were taken for the purpose, as described in the acts of Congress, for preserving the site of a great and decisive battle of the Civil War, for properly marking with tablets, etc., the positions occupied by various commands of the two armies, for opening and improving avenues along the positions of the various organizations engaged, with reference to the study and correct understanding of the battle, etc. In the *Shoemaker case* the lands were to be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States (p. 284).

In the present case the Government, by a public improvement which it had undoubted power to make, was about to flood the larger part of a considerable town and destroy at one time the homes and places of business of over 1,100 people. Unless it made provision for them by establishing a new town site, they must necessarily scatter abroad to seek homes elsewhere; or, if they desired to remain in the immediate vicinity, they must necessarily compete with each other in purchasing new sites for homes and business under conditions laying them open to the exactions of landowners and speculators. Under these circumstances Congress apparently felt that there was a moral obligation on the Government to provide them with a new town site where, by the appraisal of lots in advance and their exchange or sale by Government officials, they would

be protected from such hardships and exactions. Moreover, as was very justly and truly said by the court below (R. 31, 32):

> The conditions are exceptional. The major part of an improved and occupied town site is essential to the execution of a great public work. Vested rights there are in great variety and complexity, public as well as private. It is fair to assume that on the town site are streets and avenues, sidewalks, water pipes, sewers, schoolhouses, and possibly other public structures. The right to condemn may be doubtful, and even if the right be assumed, the process of procuring title, necessarily intricate and difficult. By providing and improving an equivalent site in close proximity the Government may, by voluntary action on the part of private owners and the public, be able to acquire rights which otherwise it would be impossible or at least extremely difficult to extinguish.

In the *Gettysburg case* the court, referring to the fact that power to condemn lands was not *expressly* given to Congress by the Constitution, said (p. 681) that such power—

> results from the powers that are given, and it is implied because of its necessity or because it is appropriate in exercising those powers.

The court then quoted from the opinion of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, the well-known sentence:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means

> which are appropriate, which are plainly adapted to that end, *which are not prohibited*, but consist with the letter and spirit of the Constitution, are constitutional.

In *Sweet* v. *Rechel*, 159 U. S. 380, 392, 393, the court, speaking of a Massachusetts act authorizing the City of Boston to take a body of land for a purpose specified, said—

> * * * it was necessarily implied that the exercise of the power must have some real, substantial relation to the general good and welfare. But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution.

The subject of the exercise of the power of eminent domain furnishes a striking illustration of how legislation and decision follow and adapt themselves to the exigencies created by the rapid development of modern society. In the *Shoemaker case*, *supra*, decided in 1893, the court said (p. 297):

> In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power.

The court then showed that in the older cities and towns there were often *commons* or public grounds, generally laid out when the town was platted, not as places for exercise and recreation but for common pasturage of domestic animals; and that in Johnson's Encyclopædia it was stated that the first place deliberately provided for exclusive use as a pleasure ground for rest and exercise in the open air was Central Park, New York. The court then added (p. 297):

> The validity of the legislative acts erecting such parks, and providing for their cost, has been uniformly upheld. It will be sufficient to cite a few of the cases. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234; *In re Commissioners of the Central Park*, 63 Barb. 282; *Owners of Ground* v. *Mayor of Albany*, 15 Wend. 374; *Holt* v. *Somerville*, 127 Mass. 408; *Foster* v. *Boston Park Commissioners*, 131 Mass. 225; also 133 Mass. 321; *St. Louis County Court* v. *Griswold*, 58 Missouri, 175; *Cook* v. *South Park Commissioners*, 61 Illinois, 115; *Kerr* v. *South Park Commissioners*, 117 U. S. 379.

In *Mt. Vernon Cotton Co.* v. *Alabama Power Co.* 240 U. S. 30, the court upheld a State statute authorizing a private power company to condemn lands and water rights to create electric energy for sale to the public generally. In the course of the opinion the following striking passage occurs (p. 32):

> In the organic relations of modern society it may sometimes be hard to draw the line that is supposed to limit the authority of the legis-

> lature to exercise or delegate the power of eminent domain. But to gather the streams from waste and to draw from them energy, labor without brains, and so to save mankind from toil that it can be spared, is to supply what, next to intellect, is the very foundation of all our achievements and all our welfare. If that purpose is not public we should be at a loss to say what is. The inadequacy of use by the general public as a universal test is established. *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. The respect due to the judgment of the State would have great weight if there were a doubt. *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 607; *O'Neill* v. *Leamer*, 239 U. S. 244, 253. But there is none. See *Otis Co.* v. *Ludlow Manufacturing Co.*, 201 U. S. 140, 151.

And so this court has affirmed the power of State legislatures to create irrigation and drainage districts and authorize the condemnation of lands for the purposes of irrigation and drainage; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112; *O'Neill* v. *Leamer*, 239 U. S. 244; *Houck* v. *Little River Drainage District*, 239 U. S. 254; and indeed has gone the length of sustaining the taking by one individual of a right of way through the lands of another for an irrigation ditch where a State statute expressly authorized such taking, *Clark* v. *Nash*, 198 U. S. 361; and also, when authorized by State statute, the condemnation by a private mining company of a right of way for an aerial bucket line

across the placer mining claims of another, *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527.

It is no objection to a taking by the United States for the primary purpose of improving navigation that the statute authorizing the taking also provides for the incidental purpose of developing water power "either for the direct use of the United States, or by lease * * * through the Secretary of War." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 72, 73. And a State statute of similar purport was upheld in *Kaukauna Co.* v. *Green Bay, &c. Canal*, 142 U. S. 254, 273.

II.

The need of land and homes for the large number of additional workmen, necessarily to be employed in the building of the dam and other improvements, made the taking one for a direct public use of the United States.

In the petition it was alleged that the land was desired in part for the housing of workmen employed in constructing the dam. F. A. Banks, construction engineer for the proposed dam and reservoir, with large experience in designing and constructing similar works for the Reclamation Service, testified for the Government that about 1,000 men would be employed on the construction work. As the town contained only about 1,500 people all told, it is obvious that many of these men would come from other places, and some would bring their families. Mr. Banks further testified that it tended to efficiency and economy to provide homes and plots of ground for

gardens for these men and their families, thus holding them to their jobs (R. 23); that it would take about four years to construct the first unit of the dam, and there would be an interval of ten or fifteen years before the irrigation development would justify the construction of the dam to its full height, and would then take four years more to complete it (R. 24); and that it was the intention of the officials to use portions of the new town site, including the lands of the defendant, for government employees.

The court below expressed the opinion that this allegation and testimony could not be considered, first, because the construction engineer was not authorized to speak for the Government, saying that the Secretary in his letter to the Attorney General had stated that the land was needed for a new town site, without intimating any other use, and no other could properly be alleged or proved; and second, because the testimony did not show definitely where within the new town site the employees were to be located. (R. 30.)

It seems to us that the court was clearly in error. The additional use was not inconsistent with the purposes specified by the Secretary, and it is not to be conclusively presumed that the Secretary, in requesting condemnation, would set out all the uses to which the land was to be put.

In any event the court, we think, will take judicial notice of the geographical facts as to this isolated community; the need of additional workmen from

other places; that they would come and, in some instances at least, bring their families with them, and that it would be necessary to provide housing for them. In this view there was need of the lands for an additional and direct public use of the United States arising out of the necessities and surroundings of the geographical location of a work of such magnitude.

III.

With reference to the incorporated town of American Falls, the taking was for a municipal public purpose, in the narrow sense.

The taking was for the direct relief and advantage of three-fourths of the inhabitants and for the general good and prosperity of all. To illustrate, let us suppose that Idaho were still a Territory and all the other conditions were as at present, and Congress, to provide for the people of the area to be flooded and in the exercise of its plenary power of legislation over the Territories, had, by special act, delegated to the town the power of eminent domain for the purpose of acquiring land for their immediate accommodation, and for ultimate sale to them at appraised prices. Could it be said that it was not an appropriate and legitimate municipal function to thus care for the displaced inhabitants, and that the act was beyond the constitutional power of Congress? We think not. But what Congress could thus have done indirectly and by delegation it certainly could have done, under the same circumstances, directly, and in

the name of the United States. Does the existence of the State make any difference? The purpose is none the less a public one of the municipality, and the exigency to be met was caused by the action of the United States.

When we connect with this municipal public purpose the direct benefits accruing to the United States, and its obligation to provide for the inhabitants driven wholesale from their homes and places of business, it seems to us that the public use is so fully demonstrated as to dispel all doubt of the validity of the statute.

In this connection it is to be noted that the public purpose need not necessarily be a public purpose, exclusively, of the sovereign by whose authority the lands are condemned. In earlier times it was the common practice for the States to condemn lands for the use and benefit of the General Government by exercising their own powers of eminent domain, and this was generally held to be a proper and lawful use of their sovereign powers. *Reddall* v. *Bryan*, 14 Md. 444; *In re League Island*, 1 Brewster (Pa.), 524, 527; *Burt* v. *Merchants' Ins. Co.*, 106 Mass. 356; *Gilmer* v. *Lime Point*, 18 Calif. 229; *Harris* v. *Elliott*, 10 Pet. 25; *contra*, *Trombley* v. *Humphrey*, 23 Mich. 471. Most of these decisions, however, lay some stress upon the fact that the use to which the Government puts the land is beneficial or advantageous to the local public.

IV.

But few of the decided cases are helpful—Pitznogle v. Western Maryland Ry. Co., 119 Md. 673.

It would be of little help to cite or analyze even a small part of the vast array of decisions, often inconsistent with each other, on the question of what constitutes a public use. Hardly any of them have a direct bearing on the exceptional case presented by the dominant feature here; namely, a use which becomes a public one of the United States because of its intimate but incidental connection with another taking unquestionably within the power of the General Government. Indeed, an extended search has disclosed only one case closely analogous, namely, *Pitznogle* v. *Western Md. R. R. Co.*, 119 Md. 673. There the Railway Company took, under delegated power, for the purpose of its tracks and yards, a piece of land together with a private right of way thereover which constituted the only access of certain private citizens to a public highway; and it was held that the Railway Company could condemn an additional strip of land for a substitute right of way. In reaching this conclusion, the court said (p. 679):

> The condemnation of a part of this land, here sought to be condemned, for a substitute private road or way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution.

That case, indeed, goes further than the c
needs to go to uphold the taking in the present
where nearly three-fourths of the inhabitants
whole town are vitally interested in the substi
town site.

See also *Beauchamp* v. *Great Western Ry. Co.*, L
3 Ch. App. 745 (1868), which was very similar i
essential features.

Many of the cases already cited and discussed s
that the term "public use" is flexible and adapt
and, to a large degree, a matter of times, pl
special conditions, special necessities, and e
gencies; and the following additional decisions
directly to that effect: *State* v. *Thurston County*
Wash. 660, 667; *Concord Railroad* v. *Greely*
N. H. 47, 58; *Potlatch Lumber Co.* v. *Peterson*
Idaho, 769, 783; *Tanner* v. *Treasury Tunnel*
Co., 35 Colo. 593; *Paxton* v. *Farmers Irrigation*
45 Nebr. 884; *Scudder* v. *Trenton Delaware Falls*
1 N. J. Eq. 694, 728, 729; *Billings Sugar Co.* v.
40 Mont. 256, 271.

As the taking here is by the sovereign itself,
Congress in specifying the use has deliberately d
mined it to be a public one, it seems to us enti
clear, on the facts appearing and the author
cited, that the court can not find the taking t
so palpably for other than a public use as to req
a decision holding the law unconstitutional.

V.

Interest was not payable because defendant remained in exclusive possession up to the time of the judgment.

As appears by the judgment, the award fixed the value of the lands as $6,250 *at the date of the summons.* (R. 19.) The defendant himself testified that the only interference with his possession or use of the land "consists of the commencement of this suit and the issuance of summons therein, and the service thereof upon the defendant in June, 1921." (R. 33.) It is clear, therefore, that he was still in the possession and use of the lands at the time of the award and judgment. The court, having reserved to itself the question of interest, thereupon awarded interest in the sum of $328.12, being at the rate of seven per cent (7%) from the date of the summons to the date of the judgment.

The awarding of interest constitutes the only error assigned or relied on by the United States.

We take it as now finally settled that when private lands are appropriated or condemned by the United States, the owner is entitled to interest from the time he was actually deprived of possession and use, and that it is proper, but not mandatory, to allow interest at the rate prescribed by the local statutes. *United States* v. *Rogers*, 255 U. S. 163; *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299. Those decisions go no further.

In *Shoemaker* v. *United States*, 147 U. S. 282, however, it was just as clearly settled that interest is not allowable pending condemnation proceedings where the defendant has not yet been dispossessed. There the court said (pp. 320, 321):

> The fourteenth assignment charges the court with error in refusing to allow interest on the amounts assessed as the values for lands selected for the Rock Creek Park. The argument shows that the interest claimed was for the time that elapsed between the initiation of the proceedings and the payment of the money into court. The vice of this contention is in the assumption that the lands were actually condemned and withdrawn from the possession of their owners by the mere filing of the map. Interest accrues either by agreement of the debtor to allow it for the use of money or, in the nature of damages, by reason of the failure of the debtor to pay the principal when due. Of course, neither ground for such a demand can be found in the present case. No agreement to pay the interest demanded is pointed to, and no failure to pay the amount assessed took place. That amount was not fixed and ascertained till the confirmation of the report. Then some of those entitled to the assessments accepted their money, the plaintiffs in error declined to accept, and the amounts assessed in their favor were paid into court, which must be deemed equivalent to payment.
>
> It is true that, by the institution of proceedings to condemn, the possession and en-

joyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to the condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority. *Reid* v. *Hanover Branch Railroad*, 105 Mass. 303; *Kidder* v. *Oxford*, 116 Mass. 165; *Hamersley* v. *New York City*, 56 N. Y. 533; *Norris* v. *Philadelphia*, 70 Penn. St. 332; *Chicago* v. *Palmer*, 93 Illinois, 125; *Phillips* v. *South Park Commission*, 119 Illinois, 626.

To the same effect was *Bauman* v. *Ross*, 167 U. S. 48, 598; also *United States* v. *Town of Nahant* (C. C. A.), 153 Fed. 520, 525; *Town of Hingham* v. *United States* (C. C. A.), 161 Fed. 295, 299.

The *Shoemaker* and *Bauman* cases both involved lands in the District of Columbia, and in the case at bar the lands are in the State of Idaho. But the right to interest is obviously not a matter of procedure but of substantive right. It is not, therefore, affected by the statutory rule of conformity to State laws in condemnation proceedings. In takings by the United States the only criterion is the "just compensation" of the Constitution. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 341;

Bauman v. *Ross, supra,* p. 574; *Seaboard Air Li*
Ry. Co. v. *United States,* 261 U. S. 299.

Whether just compensation requires the allowan
of interest in any particular case is to be determine
by general principles of jurisprudence, not by th
laws of the State in which the property lies. In th
Rogers case, supra, the court said (p. 169):

> The Government urges that the Conformit
> Act of August 1, 1888, does not require th
> United States Government to be bound by th
> rule of the state statute in the allowance
> interest. This may be true, but we agr
> with the courts below that the allowance
> just compensation by giving interest from th
> time of taking until payment is a convenie
> and fair method of ascertaining the sum
> which the owner of the land is entitled. Th
> fact that the rule is in harmony with the polic
> of the State where the lands are situated do
> not militate against but makes for the justi
> and propriety of its adoption.

To this passage the court cited *United States*
Sargent, 162 Fed. 81; and in the latter case the Ci
cuit Court of Appeals said (p. 84):

> Without holding that the requirement f
> payment of interest is one of the "modes
> proceeding," which, by Section 2 of the Act
> August 1, 1888, is made compulsory upon th
> courts of the United States, we are satisfied
> conform to it as a palpably fair and reasonab
> method of performing the indispensable co
> dition to the exercise of the right of emine

> domain, namely, of making "just compensation" for the land as it stands, at the time of taking.

In *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 305, the court, speaking of the *Rogers case*, *supra*, said:

> Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution.

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 313, Congress, in authorizing the taking, had declared that "in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls shall not be considered or estimated;" and in reference to this provision the court said that under the Constitution the measure of compensation was a judicial, not a legislative, question, and Congress could not "say what compensation shall be paid, or even what shall be the rule of compensation" (p. 327); and compensation was in fact given for the franchise to take toll notwithstanding the congressional inhibition.

If Congress can not prescribe the rule of compensation for takings by the United States, State legislatures certainly can not.

In the present case, it does not appear whether the District Court, in allowing interest, followed a local statute or rule, but obviously that is immaterial. Under the circumstances, just compensation did not include interest, for the defendants remained in the possession and use of the lands.

CONCLUSION.

The judgment should be reversed with directions to enter a judgment for the amount of the award alone.

JAMES M. BECK,
Solicitor General.
W. W. DYAR,
Special Assistant to the Attorney General.

OCTOBER, 1923.

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BROWN ET AL. *v.* UNITED STATES.

UNITED STATES *v.* BROWN ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

Nos. 97 and 98. Argued October 19, 1923.—Decided November 12, 1923.

1. Where establishment of a reservoir under the Reclamation Act involved flooding part of a town, the United States had constitutional power to take by condemnation other private land near by, in the only practicable and available place, as a new townsite to which the buildings affected could be moved at the expense of the United States and new lots be provided in full or part satisfaction for those flooded. P. 81.
2. The fact that, as an incident of such a readjustment, there may be some surplus lots of the new townsite which the Government must sell, does not characterize the condemnation as a taking of one man's property for sale to another. P. 82.
3. When the award in condemnation is for the value of the property as of the date of the summons without regard to the damage arising from the owner's inability to sell or lease during the proceedings, and, under the applicable state law, the Government may obtain possession promptly after bringing suit, interest from date of summons to judgment may be allowed on the award, even though the owner remained in possession, cultivating and gathering crops meanwhile. P. 84.
4. While, *semble*, the Act of 1888, in directing federal courts to conform their practice and procedure in condemnation "as near as may be" to that of the State where the property is, does not bind them to follow state statutes allowing interest on the award, interest in this case, at 7%, was properly included, in fixing just compensation. P. 86.

279 Fed. 168, affirmed.

WRITS of error, by both sides, to review a judgment of the District Court in a condemnation case.

Mr. J. H. Peterson, with whom *Mr. T. C. Coffin* was on the brief, for Brown et al.

The United States is without power to condemn land for the purposes of a town site under the circumstances set out in the record.

Under the most liberal definitions, the taking proposed could not be construed to be for a public use.

"It is conceded on all hands that the legislature has not power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public benefit." Cooley's Const. Lim., 6th ed., p. 651.

The public use necessary cannot be found in the business speculation involved in the transaction. Nichols, Eminent Domain, p. 178.

If there is any other purpose except a desire to salvage a portion of the movable property in the old town site and to reduce the expenditure for a public improvement, it must be found in the solicitude of the Government for the residents of the old town site. This likewise cannot be construed to be a public use, because, in any event, its benefit accrues to a very limited number of people. There would seem to be necessarily some limit beyond which even the Federal Government should not be permitted to go in taking private property under an "exigency created by rapid development." Nichols, Eminent Domain, p. 149; *Chicago & N. W. Ry. Co.* v. *Cicero*, 157 Ill. 48; *Salisbury Land & Improvement Co.* v. *Commonwealth*, 215 Mass. 371; *Jones* v. *Tatham*, 20 Pa. St. 398; *Opinion of Justices*, 204 Mass. 607; *Richmond* v. *Carneal*, 129 Va. 388.

Mr. W. W. Dyar, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These are cross writs of error to a judgment of the District Court of Idaho in a condemnation case. The plaintiffs in error are owners of a tract of 120 acres, which was the object of the suit by the United States. The jury rendered a verdict of $6,250.00 for the plaintiffs, and the court added $328.00 as interest at seven per cent., from the date of the issuing of the summons to that of the judgment. The plaintiffs denied the power of the Congress under the Federal Constitution to condemn the land because not taken for a public use. This entitled them to come to this Court under § 238 of the Judicial Code; and so the United States sued out a cross writ of error to question the legality of including in the judgment the interest item.

Plaintiffs' tract lies just outside the present limits of American Falls in Idaho. The town has 1,500 people and is so situated in the valley of the Snake River that three-fourths of the town, or 640 acres, will be flooded by the waters of a reservoir which the United States proposes to create, for irrigation of its arid public land, by damming the waters of the river.

The Sundry Civil Act of March 4, 1921, c. 161, 41 Stat. 1367, 1403, appropriates $1,735,000 in addition to an unexpended balance for the continuation of the construction and extension of the irrigation system called the Minidoka Project, "with authority in connection with the construction of American Falls Reservoir, to purchase or condemn and to improve suitable land for a new town site to replace the portion of the town of American Falls which will be flooded by the reservoir, and to provide for the removal of buildings to such new site and to plat and to provide for appraisal of lots in such new town site and to exchange and convey such lots in full or part payment for property to be flooded by the reservoir and to sell for not less than the appraised valuation any lots not used for such exchange."

The United States has purchased 410 acres for the new town site and needs 165 acres more of which plaintiffs' tract of 120 acres is part. Negotiations for purchase from the plaintiffs failed, as they demanded $24,000.

The plaintiffs contend that the power of eminent domain does not extend to the taking of one man's property to sell it to another, that such an object can not be regarded as for a public use of the property, and, without this, appropriation can have no constitutional validity. The District Court held that the acquisition of the town site was so closely connected with the acquisition of the district to be flooded and so necessary to the carrying out of the project that the public use of the reservoir covered the taking of the town site. We concur in this view.

The circumstances of this case are peculiar. An important town stood in the way of a necessary improvement by the United States. Three-quarters of its streets, alleys and parks and of its buildings, public and private, would have to be abandoned. The buildings could not be moved except to the gradually rising ground east of the Snake River. There was a bluff one hundred feet high on the other side of the river. The tract of four hundred and seventy-five acres selected for the new town site was the only practical and available place to which the part of the town to be flooded could be moved so as to be united with the one-quarter of the old town which would be left. American Falls is a large settlement for that sparsely settled country and it was many miles from a town of any size in any direction. It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.

No one would say that a legislative act authorizing a railway company to build a railroad exceeds the constitutional limit by reason of a specific provision that the

company may condemn land not only for the right of way but also additional land adjacent thereto for use as borrow pits in making fills and embankments, or for use as spoil banks or dumps for the earth excavated from tunnels and cuts. Such adjacent land would certainly be devoted to the public use for which the railway was being constructed. If so, then the purchase of a town site on which to put the people and buildings of a town that have to be ousted to make the bed of a reservoir would seem to be equally within the constitutional warrant. The purchase of a site to which the buildings of a town can be moved and salvaged and the dispossessed owners be given lots in exchange for their old ones is a reasonable adaptation of proper means toward the end of the public use to which the reservoir is to be devoted. The transaction is not properly described as the condemnation of the land of one private owner to sell it to another. The incidental fact that, in the substitution and necessary adjustment of the exchanges, a mere residuum of the town-site lots may have to be sold does not change the real nature of what is done, which is that of a mere transfer of the town from one place to another at the expense of the United States. The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted to the exigency. It would be hard to fix a proper value of homes in a town thus to be destroyed without prospect of their owners' finding homes similarly situate on streets in another part of the same town or in another town near at hand. It would be difficult to place a proper estimate of the value of the streets and alleys to be destroyed and not to be restored in kind. A town is a business center. It is a unit. If three-quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the munici-

pality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution.

The circumstances of this case are so peculiar that it would not be surprising if no precedent could be found to aid us as an authority. There is one, however, which presents a somewhat close analogy. In *Pitznogle* v. *Western Maryland R. R. Co.*, 119 Md. 673, a railroad company condemned a piece of land for its tracks and yards and in doing so appropriated a private right of way which was the only access of certain other land owners to the public highway. It was held that the railway company could condemn an additional strip of land for a substitute right of way to be furnished to these land owners. In reaching this conclusion the court said:

"The condemnation of a part of this land, here sought to be condemned, for a substitute private road or way is incident to and results from the taking, by reason of public necessity, of the existing private road for public use, and the use of it for such purposes should, we think, be regarded as a public use within the meaning of the Constitution".

Our conclusion is not in conflict with that class of cases with which the Justices of the Supreme Judicial Court of Massachusetts dealt in the *Opinion of Justices*, 204 Mass. 607. It was there proposed that the City of Boston, in building a street through a crowded part of the city, should be given power to condemn lots abutting on both sides of the proposed street with a view to sale of them after the improvement was made, for the promotion of the erection of warehouses, mercantile establishments and other buildings suited to the demands of trade and commerce. The Justices were of opinion that neither the development of the private commerce of the city nor the incidental profit which might enure to the

city out of such a procedure could constitute a public use authorizing condemnation. The distinction between that case and this is that here we find that the removal of the town is a necessary step in the public improvement itself and is not sought to be justified only as a way for the United States to reduce the cost of the improvement by an outside land speculation.

The remaining question in this case arises on the cross writ of error of the United States by which exception is taken to the court's having included in the judgment interest at seven per cent. on the value of the property, as found by the jury, from the date of the issuing of the summons until the date of the judgment. The land remained in the possession of the owners up to date of the judgment and they cultivated the land meantime and gathered crops therefrom.

The District Court, in directing the jury, followed the law of the State (§ 7415, Compiled Laws of Idaho, 1919; § 5221, Idaho Revised Codes, 1908) in which the land lay and the court was sitting, as follows:

"For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken. . . . No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or damages."

The Idaho statute has been construed by the Circuit Court of Appeals of the Ninth Circuit to justify the court in adding interest upon the value fixed by the jury from the date of the summons until the judgment. *Weiser Valley Land & Water Co.* v. *Ryan*, 190 Fed. 417, 424. The court said:

"Having such right to compensation at a given time, it would seem that the owner ought to have interest upon

the amount ascertained until paid. In the meanwhile he can claim nothing for added improvements, nor is he entitled to any advance that might affect the value of the property."

Counsel for the United States cite against such a ruling the case of *Shoemaker* v. *United States*, 147 U. S. 282, 321, wherein, in a District of Columbia condemnation, there being no specific statute on the subject, it was held that no interest should be paid to the owner until the taking. The court said:

"It is true that, by the institution of proceedings to condemn, the possession and enjoyment by the owner are to some extent interfered with. He can put no permanent improvements on the land, nor sell it, except subject to condemnation proceedings. But the owner was in receipt of the rents, issues, and profits during the time occupied in fixing the amount to which he was entitled, and the inconveniences to which he was subjected by the delay are presumed to be considered and allowed for in fixing the amount of the compensation. Such is the rule laid down in cases of the highest authority."

This was followed in *Bauman* v. *Ross*, 167 U. S. 548, 598, in which Mr. Justice Gray, speaking for the Court in reference to the validity of a statute providing for condemnation proceedings in the District of Columbia, said:

"The payment of the damages to the owner of the land and the vesting of the title in the United States are to be contemporaneous. The Constitution does not require the damages to be actually paid at any earlier time; nor is the owner of the land entitled to interest pending the proceedings."

In these cases, the value found was at the time of taking or vesting of title and the presumption indulged was that the valuation included the practical damage arising from the inability to sell or lease after the blight of the

summons to condemn. Where the valuation is as of the date of the summons, however, no such elements can enter into it and the allowance of interest from that time is presumably made to cover injury of this kind to the land owner pending the proceedings. It often happens that in the delays incident to condemnation suits the loss to the owner arising from the delay between the summons and the vesting of title by judgment is a serious one. The interest charge under the Idaho statute has the wholesome effect of stimulating the plaintiff in condemnation to prompt action. Moreover the plaintiff may reduce to a minimum the rents and profits enjoyed by the defendant because, under the Idaho statute, the plaintiff may have a summary preliminary hearing before commissioners to fix probable damages and, by depositing the amount so fixed with the clerk of the court, if the defendant will not accept it, the plaintiff may obtain immediate possession. Within less than a month after bringing suit, he can thus appropriate to himself the rents and profits of the land, and in enjoyment of them can await the final judgment. Idaho Compiled Statutes, 1919, Vol. 2, § 7420; Idaho Revised Codes, 1908, Vol. 2, § 5226.

It is urged, however, that the federal conformity statute as to condemnation suits, which directs federal courts to conform the practice and procedure "as near as may be" to that of the courts of the State where the land is, does not require or authorize the federal courts to allow interest to the property holder except according to the rule laid down in the *Shoemaker Case*, the *Bauman Case*, *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299, 305, and *United States* v. *Rogers*, 255 U. S. 163, in all of which interest was allowed only from the time of taking or vesting of title; that this is a matter of substance which a conformity statute was not intended to cover, as appears from the language of the opinions in the last two cases. It will be observed, however, that in those two cases the

allowance of interest did conform to the state statutes, and that this was given by the Court as an additional reason for sustaining its conclusion. It is doubtless true that the conformity provision of the Act of 1888 does not bind the federal courts to follow the state statute in the matter of interest. But the disposition of federal courts should be to adopt the local rule if it is a fair one, and, as already indicated, we are not able to say that with the value fixed as of the date of summons, and the opportunity afforded promptly thereafter to take possession, interest allowed from the date of the summons is not a provision making for just compensation. *North Coast R. R. Co.* v. *Aumiller,* 61 Wash. 271, 274. In *United States* v. *Sargent,* 162 Fed. 81, the Government condemned land in Minnesota for a post office. Under the statute of that State the hearing was before three commissioners who were to report the damages sustained on account of the taking. Unless this resulted in payment and settlement, a hearing before a court or jury followed and judgment was entered on that, and possession was given on payment of the judgment, which included costs and interest from the time of filing the commissioners' report. The commissioners' report was filed June 12, 1907, the report was confirmed August 19, 1907, and interest was allowed from June 12th until the date when the damages were paid into the registry of the court. The Circuit Court of Appeals thought the rule a fair one. Speaking by Judge Adams (162 Fed. 84), it said:

"Considerable time may elapse after the commissioners fix the value of the land before it is ultimately paid for. They can only fix it as of the time they act. They can not say what it will be at any definite time in the future. The value may for many reasons change, and the rental value may be materially affected by the tenure of the owner rendered uncertain by possible protracted litigation. Considerations like these doubtless

prompted the Legislature of the state to provide that the amount of the award should bear interest until paid as the best and fairest available method of providing against the possible consequences just suggested. Without holding that the requirement for payment of interest is one of the 'modes of proceeding' which, by section 2 of the act of August 1, 1888, is made compulsory upon the courts of the United States, we are satisfied to conform to it as a palpably fair and reasonable method of performing the indispensable condition to the exercise of the right of eminent domain, namely, of making 'just compensation' for the land as it stands, at the time of taking. 'The time of taking' under the Minnesota statute, *supra*, is when the payment is made for it. . . . It is better, when possible, to act in harmony rather than in conflict with the established policy of a state."

In the last opinion of this Court on the question of interest in the appropriation of land by the United States, that in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306, the case of *United States* v. *Sargent* and part of the language above quoted is cited with approval.

Judgment affirmed.

SCHWAB *v.* RICHARDSON, AS TREASURER OF